No. 16022

United States

Court of Appeals

for the Ninth Circuit

LOS ANGELES MEAT AND PROVISION DRIVERS UNION LOCAL No. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al., Appellants,

vs.

LEWIS FOOD COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-17-58

No. 16022

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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RAY L. JOHNSON, JR.,
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In the United States District Court, Southern District of California, Central Division

No. 20333-BH

LEWIS FOOD COMPANY, a California corporation, Plaintiff,

vs.

LOS ANGELES MEAT AND PROVISION DRIVERS UNION LOCAL NO. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA LOCAL 542, an unincorporated association; DOE ONE ASSOCIATION to DOE FIVE ASSOCIATION (inclusive of all intervening numbers as though each association was severally and separately designated), each an unincorporated association; DOE ONE CORPORATION to DOE FIVE CORPORATION (inclusive of all intervening numbers as though each corporation was severally and separately designated), Defendants.

COMPLAINT FOR DAMAGES

Comes now the plaintiff and for cause of action against the defendants, and each of them, alleges:

I.

This action arises under the laws of the United

States regulating commerce; jurisdiction is conferred by virtue of Title 29 USC Section 187.

II.

Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of California. Plaintiff is now, and at all times herein mentioned has been, engaged in the business of manufacturing, producing, distributing and selling pet foods, with its principal place of business at 817 East Eighteenth Street, in the City of Los Angeles. County of Los Angeles, State of California.

Plaintiff at all times herein mentioned has employed, and now employs, persons who work in the following classifications: Cooks, shipping and receiving clerks, tow motor operators, drivers, machine operators and retort operators.

III.

Defendants Los Angeles Meat and Provision Drivers Union Local No. 626 and Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 542 and Doe One Association to Doe Five Association (inclusive of all intervening numbers) are each labor organizations and are unincorporated associations in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment and conditions of work.

Each of said defendant unincorporated associa-

tions is now, and at all times herein mentioned has been, composed of more than two persons residing in and associated in business under a common name, as above alleged, in the County of Los Angeles, State of California. All of said defendant labor organizations are associated with one another and with the American Federation of Labor.

IV.

Since on or about August 18, 1953, to the date of filing this complaint, plaintiff has each and every year produced and shipped in excess of $250,000.00 worth of goods and materials to the States of Oregon, Washington, Nevada, Arizona and the Territory of Hawaii.

V.

Defendants Doe One Association to Doe Five Association (inclusive of all intervening numbers), defendants Doe One Corporation to Doe Five Corporation (inclusive of all intervening numbers) are fictitious names; said associations and corporations are sued herein by such fictitious names because their true names are unknown to plaintiff, and plaintiff will ask leave of court to amend this complaint and to substitute their true names when the same have been ascertained.

VI.

The specifically named defendants, and the fictitiously named defendants, and each of them, at all times herein mentioned, have been parties to the unlawful activities hereinafter alleged and have

been acting in concert and conspiracy with respect to the acts and matters hereinafter alleged and referred to.

VII.

On or about June 6, 1952, the National Labor Relations Board conducted an election among the employees of plaintiff for the purpose of determining the bargaining representative of plaintiff's employees. The Association of Independent Workers of America which at the time of the election was known as the Association of Pet Food Manufacturers Employees, won the election and was, and now is, certified as the bargaining representative of plaintiff's employees by the National Labor Relations Board.

VIII.

On or about the 11th day of September, 1952, plaintiff entered into a contract with the Association of Pet Food Manufacturers Employees, now known as the Association of Independent Workers of America, covering the wages, hours and working conditions of plaintiff's employees, which provided, among other things, that there would be no strike or work stoppage on the part of plaintiff's employees. Said contract was at all times herein mentioned, and presently is, in full force and effect.

IX.

On or about August 18, 1954, defendant Los Angeles Meat and Provision Drivers Union Local No. 626 did demand of plaintiff that plaintiff sign a contract covering plaintiff's employees who per-

form services in the various job classifications set forth in paragraph II of this complaint with respect to wages, hours and working conditions and did further demand that plaintiff recognize defendant Los Angeles Meat and Provision Drivers Union Local No. 626 as the exclusive bargaining agent of said employees of plaintiff and did claim that defendant Los Angeles Meat and Provision Drivers Union Local No. 626 has the exclusive right to have its members perform work for plaintiff.

X.

On or about August 19, 1954, defendants, with full knowledge that the Association of Independent Workers of America was, and is, the certified bargaining representative of the employees of plaintiff and, with full knowledge that plaintiff was and is signatory and party to a collective bargaining agreement with said Association, did establish a picket line at the place of business of plaintiff located at 817 East Eighteenth Street, City of Los Angeles, County of Los Angeles, State of California, and a picket line at the place or places of business of some of the persons with whom plaintiff was and is doing business and did on or about August 19, 1954, call a strike of plaintiff's employees and employees of some of the employers with whom plaintiff does business and, pursuant to said order of defendants to strike, approximately fifty of plaintiff's employees ceased working for plaintiff, and numerous employees of employers with whom plaintiff does business refused to work for their

employers. Many of plaintiff's employees who went on strike, pursuant to defendants' strike order, joined defendants' picket lines hereinbefore alleged and referred to, and carried picket signs which read:

"To the Public
Unfair to Organized Labor
Meat and Provision Drivers Union
Local 626 Teamsters AFL"

The number of persons participating as pickets in the picket line maintained by defendants at plaintiff's place of business, as herein alleged, consisted of as many as seventy persons at the deliver and customer entrances to plaintiff's place of business. Said pickets were massed at the entrances of plaintiff's place of business so closely together that persons and vehicles were blocked from proceeding into plaintiff's plant and were only able to do so when plant guards or officers of the Los Angeles Police Department cleared the entrances for the said persons and said vehicles; that said pickets on numerous occasions shouted foul and abusive language at persons entering and leaving plaintiff's place of business. During the said picketing, Charles Rico and Mike Singer, Business Representatives of defendant Los Angeles Meat and Provision Drivers Union Local No. 626, who were participating in said picketing, stopped a truck of plaintiff which was being driven away from plaintiff's place of business and beat up and injured two of plaintiff's employees who were in said truck.

XI.

On or about the 28th day of September, 1954, the Los Angeles Superior Court issued an injunction against defendant Los Angeles Meat and Provision Drivers Union Local No. 626, regulating the conduct of the picketing and limiting the number of pickets to two persons at each entrance to plaintiff's plant. A copy of said injunction is attached hereto as Exhibit "A" and incorporated herein.

XII.

As a direct and proximate result of the activities of the defendants, as hereinbefore alleged and referred to, defendants did engage in, and induce and encourage the employees of plaintiff and the employees of employers with whom plaintiff was and is doing business to engage in, a strike, or a concerted refusal, in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services for their employers.

XIII.

An object of the activities of the defendants hereinbefore alleged and referred to, during all times herein mentioned, was to force and require plaintiff to recognize or bargain with defendant Los Angeles Meat and Provision Drivers Union Local No. 626, as the representative of plaintiff's employees, notwithstanding another labor organization, to wit, the Association of Independent Workers of America, was and is certified as the representative of plain-

tiff's employees under the provisions of the National Labor Relations Act, and was for the further object of forcing or requiring employees with whom plaintiff was and is doing business to cease using, selling, handling, transporting or otherwise dealing in the product of plaintiff and to cease doing business with plaintiff.

XIV.

The picketing and strike, hereinbefore alleged and referred to, terminated on the 19th day of October, 1954, when an injunction was issued by Judge Peirson Hall of the United States District Court. A copy of the decree granting injunction is attached hereto as Exhibit "B" and incorporated herein.

XV.

On or about March 22, 1956, the National Labor Relations Board made and entered its decision against defendant Los Angeles Meat and Provision Drivers Union Local No. 626, pursuant to unfair labor practice charges filed by plaintiff, wherein said National Labor Relations Board did order said defendant union to cease and desist from picketing and striking plaintiff, or employers with whom plaintiff was and is doing business, all as set forth in the Decision and Order, which is attached hereto as Exhibit "C" and incorporated herein.

XVI.

On or about May 25, 1955, the United States Court of Appeals for the Ninth Circuit entered a decree against defendant Meat and Provision Driv-

ers Local Union No. 626, which ordered said defendant union to cease and desist from picketing or striking employers with whom plaintiff was and is doing business. A copy of said decree is attached hereto as Exhibit "D" and incorporated herein.

XVII.

At all times since June 11, 1956, defendant Los Angeles Meat and Provision Drivers Union Local No. 626 has established and maintained a picket line at the place of business of plaintiff at 817 East Eighteenth Street in the City of Los Angeles, County of Los Angeles, State of California. The said picket line has for its purported purpose a protest against alleged plaintiff control over the certified union, to wit, the Association of Independent Workers of America. Plaintiff alleges that said purported purpose is a subterfuge and a sham and that the true purpose of said picketing is to engage in, or to induce or encourage the employees of plaintiff and employers with whom plaintiff does business to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, an object thereof being to force or require plaintiff to recognize or bargain with said defendant union as the representative of plaintiff's employees notwithstanding another labor organization, to wit, the Association of Independent Workers of America, has been certified as the representative of plaintiff's

confederates should not be enjoined and restrained during the pendency of this action from the commission of certain acts as in the complaint filed in this action are particularly set forth and described; and hearing of said Order having come on regularly to be heard on the 20th day of September, 1954, in Department 34 of the above entitled Court and there being no appearance on behalf of the defendants and plaintiff having submitted the cause without argument, through their counsel, Hill, Farrer & Burrill, by Ray L. Johnson, Jr.; and the Court, having considered the evidence and points and authorities; and the Court, being fully advised in the premises, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, the defendant Los Angeles Meat and Provision Drivers Union, Local No. 626, and defendant Mike Grancich, their officers, agents, representatives, members, employees, attorneys, pickets and confederates, and each of them, and all persons acting by, through or in concert with said defendants, and all persons acting in aid of or in conjunction with them, or any of them, are hereby restrained and enjoined pending the hearing of this order to show cause from doing or attempting or threatening to do or causing to be done, either directly or indirectly, by any means, method or device whatsoever, any of the following acts:

(a) Picketing, standing, sitting, loitering, gathering, assembling, marching, parading, walking, stopping or stationing, placing or maintaining any pickets, or other persons, at or near, around or in front of the entrances to plaintiff's place of business located at 817 East Eighteenth Street in the City of Los Angeles, County of Los Angeles, State of California, provided, however, that not to exceed two persons or pickets may be at or near, around or in front of each entrance to plaintiff's place of business, who must not obstruct the entrances or streets adjacent thereto.

(b) Intimidating, by threats of violence, molesting, restraining or interfering with any person who undertakes, attempts or makes known a desire or intention to report for work or to enter the place of business or upon the property of plaintiff, or their vehicles, or engaging in acts of violence or threatening acts of violence against any person whatsoever.

Bond on the preliminary injunction is fixed in the sum of $1,000.00.

Dated: This 28th day of September, 1954.

/s/ ARNOLD PRAEGER,
Judge of the Superior Court.

EXHIBIT "B"

United States District Court, Southern District of California, Central Division

Civil No. 17286 PH

George A. Yager, Acting Regional Director of the Twenty-First Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner,

vs.

Meat & Provision Drivers Union, Local No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, Respondent.

DECREE GRANTING INJUNCTION

This cause came on to be heard on the verified petition of George A. Yager, Acting Regional Director for the Twenty-First Region of the National Labor Relations Board, on behalf of the Board, for a temporary injunction pending final adjudication of the Board of the matters involved, and upon issuance of a rule to show cause why injunctive relief should not be granted as prayed in the petition. The Court, upon consideration of the petition, answer, testimony, evidence, briefs and the entire record and argument of counsel for the parties, duly made and entered Findings of Fact and Conclusions of Law.

It is, therefore, by this Court ordered, adjudged and decreed that:

1. Respondent, Meat & Provision Drivers Union, Local No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, its agents, members, servants, employees, attorneys and all persons in active concert or participation with it, be and they hereby are, restrained and enjoined, pending the final adjudication of this matter by the National Labor Relations Board from:

(a) Engaging in a strike or picketing at the plant of Lewis Food Company.

(b) By any means, including picketing, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging the employees of Lewis Food Company, it customers or suppliers or of any other employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, where an object thereof is to force or require Lewis Food Company to recognize or bargain with Respondent or any other labor organization as the collective bargaining representative of any of the employees in the unit for which Association of Pet Food Manufacturers Employees is the certified representative.

2. This injunction shall remain in effect until the matters involved have been adjudicated by the National Labor Relations Board.

3. This Decree Granting Injunction, together with a copy of the Findings of Fact and Conclusions of Law upon which it is issued, shall be served by a United States Marshal upon the Respondent, Meat & Provision Drivers Union Local No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL.

Dated at Los Angeles, California this 19th day of October, 1954.

PEIRSON HALL,
United States District Judge.

[Note: Exhibits "C" and "D", the Decision and Order, Order Correcting Decision and Order, and Decree are reported in 115 NLRB No. 136. They are omitted here for reasons of economy.]

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR DAMAGES AND PLEA IN ABATEMENT

Comes now, Defendant, Los Angeles Meat and Provision Drivers Union Local No. 626 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, and pleading to the complaint herein, it:

I.

Denies each and every averment contained in

Paragraphs VI, IX, XII, XIII, XVIII, XIX and XX.

II.

Is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph VIII.

III.

Answering Paragraph VII, admits that the Association of Independent Workers of America was certified, after an election, by the National Labor Relations Board on June 6, 1952, but denies every other allegation of fact contained in this paragraph and specifically denies that said certification was, at any time, valid and legally binding because:

(1) Said Association and its successor, at all times referred to in the complaint, were and are company unions formed, dominated, assisted and financed by Plaintiff in violation of Section 8 (a) (2) of the National Labor Relations Act as amended;

(2) No valid election or certification was held or issued because said Association was not, at the time of the organization or certification, in compliance with the requirements of Section 9 (f) (g) and (h) of the said Act;

(3) The National Labor Relations Board did, on April 30, 1956, issue its formal complaint against the Plaintiff and the Association in Board cases numbered 21-CA-2061, 2203 and 21-CB-708, wherein and whereby said Board, through its General Coun-

sel, charges that the Association was at all times a company union as alleged in subparagraph (1) above. The Board has opened a hearing upon said complaint and is now in the process of taking evidence for the purpose of adjudicating whether or not said Association is, or ever was, a bona fide labor organization within the meaning of said Act and whether the certification issued to it as a bargaining representative of Plaintiff's employees was or is valid and binding.

IV.

Answering Paragraph X, Defendant admits that between August 19 and October 19, 1954 it engaged in peaceable picketing at the place of business of Plaintiff at 817 East 18th Street in Los Angeles, California and that said pickets carried signs bearing the legend set forth in the complaint but denies each and every other allegation contained in this paragraph of the complaint.

V.

Answering Paragraph XVII, Defendant admits that it established a second picket line at the place of business of Plaintiff on or about June 11, 1956 and continues the same at this time, which said picket line had and has for its purpose the publicizing of a protest against the Plaintiff's unfair labor practices in establishing, dominating and controlling the Association; that the legend carried by pickets in connection with this second picket line clearly discloses that it represents a protest against the unfair labor practices which are the subject of

the aforesaid outstanding complaint of the National Labor Relations Board against the Plaintiff and the Association, but denies each and every other allegation of fact contained in this paragraph of the complaint.

VI.

Each and all of the allegations contained in Paragraphs XI, XV and XVI of the complaint are redundant, immaterial and have no bearing upon the cause of action sought to be pleaded in the complaint.

Plea in Abatement

I.

The trial and all other proceedings in this case should be abated and no further proceedings held herein because a controlling substantial issue upon which the complaint is based, that is, the legal validity of the Labor Board Certification issued in 1952 to the Association, is presently in the process of adjudication by the National Labor Relations Board, whose primary jurisdiction to decide such matters is exclusive.

II.

After the National Labor Relations Board had issued its certification to the Association and after it had implemented said certification by injunction and unfair labor practice proceedings against Defendant, as alleged in the Complaint, the Regional Office of the National Labor Relations Board investigated charges filed with it by defendant and an individual and concluded that sufficient evidence existed to justify the issuance of a formal com-

plaint against the Plaintiff and the Association. Such complaint was duly issued on April 30, 1956 in Case 21-CA-2061, 2203 and 21-CB-708 which said complaint, in part, alleges the following:

"9. The Employer since on or about January, 1952, has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to the Association."

"10. The Employer since on or about February 27, 1954, to date, has dominated, assisted and contributed to the support of, and interfered with the administration of the Association."

III.

On June 11, 1956, hearings on the aforesaid complaint were begun before Board Trial Examiner Wallace Royster at the Board offices in Los Angeles, California, at which hearings the Plaintiff was represented by Counsel and fully participated. On the first day of such hearing a number of officials of Defendant and of the Association refused to be sworn as witnesses or to produce documents in accordance with subpoenas which had earlier been served upon them at the request of Counsel for the General Counsel of the National Labor Relations Board and, because of this fact, Counsel for the Board requested and obtained an indefinite postponement of the resumption of said hearings before said Trial Examiner in order to give him an opportunity to apply for an order from this United States District Court compelling obedience

to said subpoenas. Said hearings, solely for said reason, have continued in recess at all times to the present date.

IV.

On June 29, 1956 a proceeding entitled National Labor Relations Board, Applicant vs. D. B. Lewis, President, Lewis Food Company, et al (Civil No. 20119-TC) was filed in this Court, having for its purpose the obtaining of an order of obedience to the aforesaid subpoenas. Following the issuance of an order to show cause and hearings thereon, an order was entered as shown by the records of this Court denying enforcement of such subpoenas.

V.

Within due time, the National Labor Relations Board appealed the judgment of this District Court denying enforcement of its subpoenas and the entire case is now pending before the Court of Appeals for the Ninth Circuit.

VI.

Defendants have repeatedly been informed by Counsel for the National Labor Relations Board that its current unfair labor practice proceedings against the Plaintiff and its Association will be resumed upon the conclusion of the litigation respecting the validity of the Board's subpoenas and that the Board, through its General Counsel, will continue its efforts to establish that the Association is and at all times, both before and after its certification, was a company union formed in violation of Section 8 (a) (2) of the Act. Under the provisions of Section 10 (a) of the Act, the Board

is empowered upon a finding that unfair labor practices have been committed, to enter a remedial order which will effectuate the purpose of the Act. Routinely, the Board in the past has entered an order requiring a company to cease and desist from giving effect to any certification of a union or any contract with a union made pursuant to a certification, whenever the Board has found that such union was a company dominated or assisted union. Accordingly, should the Board in its current proceedings ultimately find in accordance with the General Counsel's complaint and defendant's contentions, that Plaintiff formed, dominated, assisted and is dominating and assisting the Association, the Board will order the certification vacated and will order the company and the Association to cease giving any effect whatsoever to said certification. Such an order by the Board would render the certification null and void ab initio and thereby make it lawful for any union to have engaged in picketing against such void certification.

VII.

A substantial issue exists under the pleadings in this case as to whether or not the Association had or has a valid certification of bargaining rights covering plaintiff's employees. Since the National Labor Relations Board is currently adjudicating the same matter and will ultimately determine the validity of its 1952 certification, this Court either lacks jurisdiction to adjudicate the same subject matter or, in the alternative, as a matter of comity,

this Court should defer the trial of this issue until the Labor Board has made a final and binding adjudication.

VIII.

The other issues posed by the complaint in this case cannot be adjudicated separately from the issue of the bona fidus of the Association without the parties, and this defendant in particular, being subjected to the piecemeal and inconclusive trial of the action.

Wherefore, defendant prays:

1. That this action be abated and no further proceedings be taken until the National Labor Relations Board has issued a final and binding decision in its cases numbered 21-CA-2061, 2203 and 21-CB-708.

2. That the Plaintiff take nothing by its complaint and that the same be dismissed in its entirety.

3. That Defendant recover its costs herein.

STEVENSON & HACKLER,
/s/ By CHARLES K. HACKLER,
Attorneys for Los Angeles Meat and Provision Drivers Union No. 626.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 5, 1957.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: February 17, 1958. At: Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge.

Deputy Clerk: L. Cunliffe. Reporter: Virginia Wright.

Counsel for Plaintiff: Ray Johnson, Esq.

Counsel for Defendant: Charles Hackler, Esq.

Proceedings: Hearing on:

1. Pre-trial conference and setting.

It Is Ordered that the above be vacated and set aside.

2. Defendant's motion for abatement:

After extensive argument from both counsel, It Is Ordered that the matter stand submitted.

Filed at request of plaintiff, N.L.R.B. Order of Trial, and at request of defendant, N.L.R.B.'s consolidated complaint and order consolidating cases for trial.

JOHN A. CHILDRESS,
Clerk,
/s/ By L. CUNLIFFE,
Deputy Clerk.

United States District Court, Southern District of California, Central Division

No. 2033-Y

LEWIS FOOD COMPANY, a California Corporation, Plaintiff,

vs.

LOS ANGELES MEAT AND PROVISION DRIVERS UNION LOCAL No. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA LOCAL 542, an unincorporated association, et al., Defendants.

MEMORANDUM OPINION AND ORDER

Yankwich, District Judge:

The Complaint filed on August 17, 1956, by the plaintiff, a California corporation engaged in manufacturing, producing, distributing and selling pet foods, seeks damages against two local unions under Section 187 of Title 29 U.S.C.A.

In substance, the Complaint alleges that the defendants Los Angeles Meat and Provision Drivers Union Local No. 626 and Teamsters Local 542, labor organizations, have maintained an illegal picket line at a place of business of the plaintiff

at 817 East 18th Street, in the City of Los Angeles, County of Los Angeles, State of California, and called a strike of some of the plaintiff's employees. This is alleged to be in violation of an Order of the National Labor Relations Board made pursuant to an election conducted by the Board on or about June 6, 1952, among the employees of the plaintiff for the purpose of determining the bargaining representative of the plaintiff's employees.

The Association of Independent Workers of America, which, at the time of the election, was known as the Association of Pet Food Manufacturers Employees,—to be referred to as "the Association"—won the election, and was, on that day, certified as and now is certified as the bargaining representative for plaintiff's employees by the National Labor Relations Board,—to be referred to, at times, as "the Board".

On or about the 11th day of September, 1952, plaintiff entered into a contract with the Association covering the wages, hours and working conditions of its employees, which provided, among other things, that there would be no strike or work stoppage on the part of plaintiff's employees. The contract was, at all times herein mentioned and presently is, in full force and effect.

Subsequent to that date, the defendant unions conducted acts of strike and picketing between August 19 and October 19, 1954, which picketing was renewed on June 11, 1956. The intervening facts may be summed up briefly in this manner: In early

August, 1954, Local 626 began organizational efforts among the plaintiff's employees and on August 19 engaged in peaceable picketing of plaintiff's place of business in Los Angeles, California. Such picketing continued until October 19, 1954, at which time it was enjoined by the Order of this Court issued in the case of Yager v. Meat and Provision Drivers Local Union, Civil No. 17286-PH. Thereafter, on March 22, 1956, the Board, in case number 21-CC-190, entered its decision finding that the Union had, by such picketing, violated Section 8(b)(4)(c) of the National Labor Relations Act, in that the picketing was found to be directed against the bargaining rights of the Association as a certified union. On May 2, 1956, an Order was entered in case number 17826-PH dissolving this court's injunction, and on November 14, 1956, the Board notified all parties that the union had satisfactorily complied with the Board's order in its case number 21-CC-190. Meantime, on March 29, 1955, a person named Otto A. Roth filed charges against the plaintiff and the Association claiming that the latter was an illegally dominated organization within the meaning of Section 8(a)(2) of the National Labor Relations Act. (21-CA-2203 and 21-CB-708) Local 626 had itself lodged similar company union charges as early as August 27, 1954. Both of these charges remained under investigation by the Regional Office of the Board during all of the Board and Court proceedings described above.

On April 30, 1956, the Board issued a formal

complaint against the plaintiff and the Association, based upon the last mentioned charges which alleges, in part, the following:

"9. The Employer since on or about January, 1952, has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to the Association.

"10. The Employer since on or about February 27, 1954, has dominated, assisted and contributed to the support of, and interfered with the administration of the Association."

Since June, 1956, Local 626 has maintained a picket line at the place of business of the plaintiff, allegedly in protest against plaintiff's control over the certified Association. The Complaint alleges that the true purpose of the picketing is

"to engage in, or to induce or encourage the employees of the plaintiff and employers with whom plaintiff does business to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service, an object thereof being to force or require plaintiff to recognize or bargain with said defendant union as the representative of plaintiff's employees notwithstanding another labor organization, to-wit, the Association of Independent Workers of America, has been certified as the representative of plaintiff's employees under the provisions of the National Labor Relations Act." (Complaint, par. XVII)

After averring that the acts and conduct of the defendants relate to trade, traffic and commerce among the several states, and have led to a labor dispute burdening and obstructing commerce and the free flow of commerce, and that it was done maliciously, the Complaint seeks actual damages in the sum of $300,000.00 and exemplary damages in the sum of $50,000.00.

It is not necessary, for the purposes of this opinion, to outline the Answer filed on behalf of Local 626, which admits many of the facts just outlined. It is sufficient to state that, in the main, it seeks to avoid the consequences of the acts by alleging that the object of the present proceedings instituted before the Board is to declare that the Association is not only dominated by the employer at the present time, but was so dominated at the time of, and prior to, the certification on June 6, 1952.

Invoking the doctrine of "primary jurisdiction", the Answer sets forth a plea in abatement, in which it is claimed that, because of the nature of the present proceedings, the Board might, in a new Order, declare that employer domination existed at the time of the certification. For this reason, it is urged that the action be abated and

"* * * no further proceedings be taken until the National Labor Relations Board has issued a final and binding decision in its cases numbered 21-CA-2061, 2203 and 21-CB-708".

The defendants argues that because of the subsequent proceeding attacks the correctness of the cer-

tification of the Association as bargaining representative, this action, which seeks damages by reason of unfair labor practices for alleged picketing and encouragement of strikes while the plaintiff had a contract with the certified union, (29 U.S. C.A., §187(b)) should abate and abide the decision of the Board in the new proceeding.

The argument is without merit. Section 187 of 29 U.S.C.A. creates a private right of action in favor of the employer to recover damages against any union guilty of any of the unfair practices denounced in the other subdivisions of the Section. The Supreme Court has held that the remedy is not

"dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true." (International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 1952, 342 U.S. 237, 244)

Rightly. For the remedy of the employer is independent of any action the Board may take to enforce the same provision. The action is akin to the private action for treble damages by persons injured by the violation of the anti-trust laws of the United States, (15 U.S.C.A., § 15) in addition to the remedies by criminal action and civil action instituted by the Government. (15 U.S.C.A., §§ 1-5)

It is true that the National Labor Relations Board, after certifying a bargaining representative, may, after the lapse of a twelve-months period, revoke the certification, disestablish the certified

union, and certify another. (29 U.S.C.A., § 159(c)(3); Wallace Corporation v. National Labor Relations Board, 1944, 323 U.S. 248, 249; National Labor Relations Board v. Gilfillan Bros., 9 Cir., 1945, 148 F. 2d 990, 991) Subject to judicial review to enforce unfair labor practice orders, the issuance or the revocation of certification is entrusted expressly and solely to the Board. However, as stated by the Court of Appeals for the Fifth Circuit:

"Whether or not the Union has lost that status is for the Board to determine upon orderly statutory procedure." (National Labor Relations Board v. Sansone Hosiery Mills, 5 Cir., 1952, 195 F. 2d 350, 353-354)

An existing certificate must be honored by both sides until it is lawfully rescinded. (Brooks v. National Labor Relations Board, 1954, 348 U.S. 86, 103)

There is unanimity among the Courts in giving recognition to this principle. As said by the Court of Appeals for the Sixth Circuit:

"* * * the decisive thing is the certification by the Board. Until by Board action it is effectually extinguished, it has continued vitally to protect an employer against a raiding rival whose objective is 'forcing or requiring [such] employer to recognize or bargain with * * * [it] * * * as the representative of [his] employees * * *'" (Parks v. Atlanta Printing Pressmen and Assistant's Union, 5 Cir., 1957, 243 F. 2d 284, 290)

In the light of these rulings, we cannot apply, as the union would have us do, in this area, principles which command courts to defer action while administrative action involving the same matter is pending. The cases invoked involve entirely different situations, arising out of dissimilar relationships in instances in which the administrative agency has exclusive jurisdiction.

Thus, in General American Tank Car Corp. v. Eldorado Terminal Co., 1940, 308 U.S. 422, an action on a contract between a shipper and a railroad was stayed while there was pending before the Interstate Commerce Commission the question of the validity of the contract as an unlawful rebate under the Interstate Commerce Act.

In Far East Conference v. United States, 1952, 342 U.S. 570, an action by the Government for alleged violation of the Sherman Anti-Trust Law by steamship owners was ordered dismissed because the Federal Maritime Board had initial jurisdiction of the matter.

In all these cases there were pending before the Administrative Board the determination of facts which, when finally determined, would not only affect, but control the actions before the courts involving similar facts. So the Courts applied what is known as the primary jurisdiction doctrine under which Courts will not determine a matter which is within the exclusive jurisdiction of an administrative agency, while the same question is pending before the agency. (See, Rochester Telephone Corp. v. United States, 1939, 307 U.S. 125, 139; Thomp-

son v. Texas Mexican Ry. Co., 1946, 328 U.S. 134, 146-151) But in none of these cases were we confronted with a statute giving to a person the right of action for past occurrences, the nature of which could not possibly be affected by future administrative action.

The summary of the cases just given shows clearly the distinction. This may be further illustrated by Nathanson v. National Labor Relations Board, 1952, 344 U.S. 25, also cited by the defendants. There, the National Labor Relations Board had ordered the Company to pay back-pay. After an involuntary petition in bankruptcy was filed, the Court of Appeals ordered the Order enforced. The Board then filed a proof of claim for the back-pay. The Supreme Court held that the bankruptcy court should not assume to determine the validity of the claim, but rather the Board should have the final determination, saying:

"It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices. We think wise administration therefore demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination." (p. 30) (Emphasis added)

The Supreme Court, in a case decided on February 3, 1958, has warned that, while the power of the National Labor Relations Board in disestab-

lishing a union as dominated by an employer is broad, it is "not limitless" (National Labor Relations Board v. District 50, United Mine Workers of America and Bowman Transportation, Inc., No. 64, October Term, 1957, slip decision, p. 4)

In the case before us, the Board not only certified the Association, but rejected contentions made by the same unions who are appearing here that the Association was employer-dominated. It follows that even if the Board, in the present proceedings, should hold that the Association is union dominated and disestablish it, this could not affect its prior certification of June 6, 1952, so as to deprive the employer who complied with it, as he was required to do, of the right to prove in this Court that between the date of the original certification and before its revocation, the union by its actions, caused him damage. To hold otherwise, would make the remedy of the employer illusory. For he could never depend on the finality of the certification in instituting an action for damages.

We are bidden to avoid interpreting a statute retrospectively unless the Congress has specifically indicated a clear intention to so apply it. As said in a leading case:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." (United States v. Magnolia Petroleum Co., 1928, 276 U.S. 160, 162-163)

(And see, Hassett v. Welch, 1938, 303 U.S. 303, 314.)

In Claridge Apartments Co. v. Commissioner, 1944, 323 U.S. 141, 164, the Court summed up the principle in this pithy manner:

"Retroactivity, even where permissible, is not favored, except upon the clearest mandate."

Concededly, the Congress, in matters dealing with the employer and employee relationship, may take away a right it has previously conferred, as happened with the passage of the Portal-to-Portal Act (29 U.S.C.A., §§ 251-262), and to give to it retroactive effect. (Battaglia v. General Motors Corp., 2 Cir., 1948, 169 F. 2d 254, 259-262; Thomas v. Carnegie-Illinois Steel Corp., 3 Cir., 1949, 174 F. 2d 711) Nevertheless, the Congress, in establishing the private remedy involved in this action, has not shown any intention to do so. The Congress, by giving the right of action to any employer injured by the provisions of Subsection (a) of Section 187, Title 29 U.S.C.A., used the imperative throughout: "Whoever shall be injured in his business or property" is given the right to sue, and "shall recover the damages by him sustained." So that, while it is given to the employer to determine whether he will sue, once he has been injured, and exercised that right, he is entitled to such damages as he may establish judicially to have suffered from the forbidden acts. No subsequent action by the Board relating to certification could deprive the employer of the right he has acquired to sue on

which, in defiance of a certification which has become final, has damaged his business or property.

Where two remedies have been given by the Congress, the Courts will enforce both, although one be administrative and the other judicial, unless the language of the statute is clear enough to bring the case within the purview of the primary jurisdiction doctrine already referred to, the foundation for which was laid by the Supreme Court in 1907, in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 1907, 204 U.S. 426, 440-442. Thus, where the United States brought action under Section 15 of the Clayton Act (15 U.S.C.A., § 25) to enjoin the violation by several corporations of the provision against interlocking directorates contained in Section 8 of the Act, (15 U.S.C.A. §19) the Supreme Court rejected the contention that because Section 11 of the same Act (15 U.S.C.A., § 21) allows the Interstate Commerce Commission to enforce the section, the action could not be entertained, by stating:

"Section 11 does authorize the Commission to enforce §8. But any inference that administrative jurisdiction was intended to be exclusive falls before the plain words of §15: 'The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act * * *' 38 Stat. 736, 15 U.S.C. & 25. And the cases have spoken of Congress' design to provide a scheme of dual enforcement for the Clayton Act." (United States v. W. T. Grant Co., 1953, 345 U.S. 629, 631-632)

In the matter before us, it is quite evident that the Congress intended to grant to the employer a right of action for damages which the Supreme Court has stated is not tied to, or dependent on, the status of administrative proceedings relating to the same controversy before the National Labor Relations Board. (International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 1952, 342 U.S. 237, 244). The object of statutes of this character is to aid the furthering of the social policy of the law by providing a private action by an individual for damages caused by the violation of the Act,—as in the case of a private action for treble damages for violation of the anti-trust laws. (15 U.S.C.A., § 15) (And see the writer's opinions in Balian Ice Cream Co. v. Arden Farms Co., 1950, D.C. Calif., 94 F. Supp. 796, 801, and cases cited in Notes 20, 21 and 22 thereof; Fanchon & Marco v. Paramount Pictures, Inc., 1951, D.C. Calif., 100 F. Supp. 84, 88, and cases cited in Footnote 5)

So, granting that the National Labor Relations Act constitutes a complete scheme for the determination of labor and management disputes affecting interstate commerce, which leaves no room for judicial intervention except by way of enforcement of the Board's orders by the Courts of Appeals, (Myers v. Bethlehem Ship Building Corporation, 1938, 303 U.S. 41, 47-50. And see, the writer's opinion in Northrop v. Madden, 1937, D.C. Calif., 30 F. Supp. 993, 995) the Congress must be presumed to have envisaged the situation in which a private court action might be pending at the same time as

an administrative action. Having authorized both actions, it is our duty to give them full effect. The more so, as any future determination by the Board as to certification could not affect the present action. The reason is obvious. The acts of which the employer complains in this action occurred at the time when the employer was required to comply with the action of the Board in certifying the Association as a bargaining agent. If he was damaged by the action of the union defendants in this case, he is entitled to recover even though by later action the Board should disestablish the Association and recognize another collective bargaining representative.

The Motion to Abate will be denied.

Dated: March 3, 1958.

/s/ LEON R. YANKWICH,
Chief U. S. District Court Judge.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Los Angeles Meat and Provision Drivers Union Local No. 626 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, defendant above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order made by Honorable Leon R. Yankwich denying defendant's

motion to abate the above entitled action, said order being entered on March 3, 1958.

Dated: March 26, 1958.

STEVENSON & HACKLER,
/s/ By HERBERT M. ANSELL,
Attorneys for Appellant.

Proof of Service by Mail Attached.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

APPLICATION FOR ORDER EXTENDING TIME TO FILE AND DOCKET RECORD ON APPEAL

Defendant and appellant respectfully requests this court to extend their time to file and docket the record on appeal with the Court of Appeals up to and including May 25, 1958.

This application is based upon the attached affidavit of Herbert M. Ansell, and upon all pleadings in the above entitled action.

STEVENSON & HACKLER,
/s/ By HERBERT M. ANSELL,
Attorneys for Defendant Local 626.

Dated: May 15. It Is So Ordered.

/s/ BURT HARRISON,
Judge.

AFFIDAVIT OF HERBERT M. ANSELL

State of California
County of Los Angeles—ss.

Herbert M. Ansell, being first duly sworn, deposes and says:

I am associated with the firm of Stevenson & Hackler, counsel for defendants in the above entitled case.

On March 31, 1958, defendants filed their Notice of Appeal from the order of Judge Leon Yankwich denying defendants' motion to abate the above entitled action until the National Labor Relations Board concluded its Case No. 21-CA-2061, 2203 and 21-CB-708.

Defendants on April 21, 1958, designated as part of the record, the transcript of oral argument rendered by counsel at the time of the said motion.

On May 12, 1958, defendants' counsel were notified by William A. White, Deputy Clerk, by letter dated May 9, 1958, that since the forty (40) day period for filing and docketing expired on May 10, 1958, and since the reporter's transcript of oral argument was not filed with the clerk, it would be necessary to renew an extension of time to allow preparation of the record.

Appellants have since receiving this notice informed Mr. White that they are willing to delate the transcript of oral argument as part of the designated record. Mr. White thereupon informed affiant that the record could be docketed in about ten (10) days.

Further affiant sayeth not.

/s/ HERBERT M. ANSELL.

Subscribed and Sworn to before me this 13th day of May, 1958.

[Seal] /s/ W. NEAL WRITTER,
Notary Public in and for said County and State.

[Endorsed]: Filed May 15, 1958.

[Note: The Intermediate Report and Recommended Decision and Decision of National Labor Relations Board in Case No. 21-CC-190 are reported fully in 115 NLRB No. 136 (March 22, 1956). They are not reproduced here for reasons of economy.]

United States of America (Copy)
National Labor Relations Board

CHARGE AGAINST EMPLOYER

* * * * *

Case No. 21-CA-2061. Date Filed: 8-27-54. Compliance Status Checked By: /s/ HA.

1. Employer Against Whom Charge Is Brought:
Name of Employer: Lewis Food Company.
Address of Establishment: 817 East 8th Street, Los Angeles, California.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and 8(a)2 of the National Labor Relations Act, and these unfair labor

practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The following persons were discharged for Union activity and specifically because they had made application to join Local Union No. 626:

Joseph Flores—1203 West 31st Street, Los Angeles 7, California:

Applied for membership about August 7th. Had worked at plant 60 days without any complaint whatever on his work. The guard at the door who admits employees, had a list, upon which was marked the names of certain people to be discharged. As they entered the plant, the guard checked this list, and from this check directed them to the office to be discharged.

Jesus Carabajal—641 N. Merida Avenue, Los Angeles 22, California:

Employed six months—applied for Union membership about August 1st; discharged about August 15th. No complaints whatever on his work. Guard instructed him to pick up final check.

Antonio Flores—5912 Woodlawn Avenue, Los Angeles, California:

Employed three and one-half years—no complaints on his work. Applied for membership with the Union about July 15th; discharged Monday, August 8th, after meeting of employees in Teamsters' group the previous Friday. Taken to office by Nathan Lewis, brother of the plant owner, and Joe Luera, foreman,

from his machine while working about 3:30 P. M. No complaints on work. This man, while waiting in the office, overheard the President of the Company Association, Walt Smith, talking to the owners in an adjoining room. Smith told the owner they were going to fire all the men who had joined the Teamsters' Union, and that five or six men were on the list for discharge the next day. Smith was telling the members who to fire.

Salvadore Jiminez—824 E. 18th Street, Los Angeles 21, California:

Worked at Lewis six years and five months. About four days prior to August 14th, was requested to break in a new man for four days, and applied for membership in the Union in July—discharged on August 14th.

Lewis Perez—2843 Blanchard Street, Los Angeles 33, California:

Employed 14 months. Filed Union application about August 7th; discharged August 11th. No complaints on his work. Was told nothing as cause for discharge. Guard instructed him to go to the office after consulting a list which he had containing names of men to be fired. The guard said: "You are one of them—go to the office." Employer had him break in a man on his machine the day previous.

Jesus Serrano—5847 S. Denver Avenue, Los Angeles 44, California:

Employed two months—no complaints on work. Applied for membership on August 11th—discharged

two days later, on August 13th. Foreman Joe Luera gave no reason for discharge, simply stated he had replacement for him. Following these discharges, workers struck on August 19th, in protest against discharges for Union activity, and have picketed ever since.

Wednesday, August 25th:

Company fired 20 strikers as they came into the plant to get their pay checks. In the succeeding three days, as strikers went to get their checks, 25 more were discharged. Horace Lewis, brother of owner in charge of warehouse, came out to picket line and asked two employees to return to work on Thursday, August 26th. These men did not return to work. They were Jose Vracamonte of 3339 E. 4th Street, Los Angeles, California, and Casmiro Lovato, Jr., of 3011 E. 5th Street, Los Angeles, California.

This strike is solely in protest against unfair labor practices in discharges.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: Meat & Provision Drivers, Local Union No. 626.

4. Address: 846 South Union Avenue, Los Angeles, California. Telephone No.: DU. 7-3359.

5. Full Name of National or International Labor Organizations of Which It Is an Affiliate or Constituent Unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

6. Address of National or International, if any: 100 Indiana Avenue, N.W., Washington, D. C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ CHARLES RICO,
Business Representative of Local 626.

August 27th, 1954.

United States of America (Copy)
National Labor Relations Board

CHARGE AGAINST EMPLOYER

* * * * *

Case No. 21-CA-2203. Date Filed: 3-29-55.

1. Employer Against Whom Charge Is Brought:
Name of Employer: Lewis Food Company.
Number of Workers Employed: 500.
Address of Establishment: 817 East 18th Street, Los Angeles 21, California.
Type of Establishment: Cannery.
Identify principal product or service: Animal Food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

Food Company in their rights guaranteed in Section 7 of the Act.

3. Name of Employer: Lewis Food Company.

4. Location of Plant Involved: 817 East 18th Street, Los Angeles 21, California.

5. Type of Establishment: Cannery.

6. Identify Principal Product or Service: Animal Food.

Number of Workers Employed: 500.

8. Full Name of Party Filing Charge: Otto A. Roth.

9. Address of Party Filing Charge: 15619 Septo Street, San Fernando, California.

10. Telephone Number: (None).

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ OTTO A. ROTH,
An Individual.

March 29, 1955.

United States of America

Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2061

Lewis Food Company and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

Case No. 21-CA-2203

Lewis Food Company and Otto A. Roth, An Individual.

Case No. 21-CB-708

Association of Food Handlers, a/k/a Association of Pet Food Manufacturing Employees, a/k/a Association of Pet Food Manufacturers Employees, a/k/a Association of Independent Workers and Otto A. Roth, An Individual.

CONSOLIDATED COMPLAINT

It having been charged by the Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, hereinafter referred to as the Union, and by Otto A. Roth, an individual, that Lewis Food Company, hereinafter referred to as the Employer, and the Association of Food Handlers, also known as Association of Pet Food Manufacturing Employees, also

known as Association of Pet Food Manufacturers Employees, and also known as Association of Independent Workers, hereinafter referred to as the Association, and each of them, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act, and the General Counsel of the National Labor Relations Board, on behalf of the Board, having issued an Order of Consolidation, the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

1. The Employer, a California corporation, is engaged at Los Angeles, California, in the manufacture of pet foods. The Employer annually sells and ships products valued at in excess of $250,000 from its Los Angeles, California, plant to points and places outside the State of California.

2. The Employer is, and at all times material herein has been, engaged in commerce within the meaning of the Act.

3. The Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. The Association is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. On or about March 23, 1955, the Association, through its officer, Walter Schmidt, restrained and coerced Otto A. Roth, an employee of the Em-

ployer, in the exercise of his right under Section 7 of the Act to refrain from joining or assisting the Association and to bargain collectively through the Association and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection in that, among other things, the Association, through its officer, Walter Schmidt, caused the Employer to deduct from the wages of said Otto A. Roth an initiation fee and dues against the will of Otto A. Roth and although said Roth had been employed less than 30 days.

6. On or about March 24, 1955, the Association, through said Walter Schmidt, caused the Employer to discharge Otto A. Roth for the purpose of encouraging membership in the Association and because he complained about and demanded the return of the aforesaid deductions from his wages.

7. On or about March 23, 1955, the Employer discriminated in regard to the terms and conditions of employment of Otto A. Roth for the purpose of encouraging membership in the Association by deducting from Otto A. Roth's wages an initiation fee and dues for the Association against the will of said Otto A. Roth and although said Roth had been employed less than 30 days, and contrary to the rights guaranteed to Otto A. Roth in Section 7 of the Act.

8. On or about March 24, 1955, the Employer, through its agent, Walter Schmidt, and its agent, Henry Mello, discharged Otto A. Roth for the purpose of encouraging membership in the Associa-

tion and, more particularly, because said Otto A. Roth complained that an initiation fee and dues had been deducted by the Employer, at the demand of the Union, from his wages and against his will and although he had been employed less than 30 days and because he sought to exercise rights guaranteed to him by Section 7 of the Act.

9. The Employer, since on or about January 1952, has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to the Association.

10. The Employer, since on or about February 27, 1954, to date, has dominated, assisted, contributed to the support of, and interfered with the administration of the Association.

11. By the acts set forth in paragraphs 5 and 6 above, the Association did engage in and is engaging in unfair labor practices within the meaning of Section 8 (b), subsection (1) (A) and subsection (2) of the Act.

12. By the acts set forth in paragraphs 7 and 8 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3) of the Act.

13. By the acts sets forth in paragraph 10 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (2) of the Act.

14. The activities of the Association set forth in

paragraphs 5 and 6 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The activities of the Employer set forth in paragraphs 7, 8 and 10 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The aforesaid acts of the Employer, as described above, constitute unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3), and Section 2, subsections (6) and (7) of the Act.

17. The aforesaid acts of the Association, as described above, constitute unfair labor practices within the meaning of Section 8 (b), subsections (1) (A) and (2), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, on this 30th day of April 1956, issues this

Consolidated Complaint against the above-named Employer and Association, Respondents herein.

[Seal] /s/ HENRY W. BECKER,
Regional Director National Labor Relations Board,
Twenty-First Region.

[Title of Board and Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708.]

ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

The General Counsel for the National Labor Relations Board having duly considered the matter and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 102.33 (b) of the National Labor Relations Board Rules and Regulations, Series 6, as amended, that these cases be, and they hereby are, consolidated.

Please Take Notice that on the 28th day of May 1956, at 10:00 a.m., D.S.T., in Room 704, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges upon which the Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Consolidated Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be admitted as true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing to be signed by the Regional Director for the Twenty-First Region on this 30th day of April, 1956.

[Seal] /s/ HENRY W. BECKER,
Regional Director National Labor Relations Board,
Twenty-First Region.

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

* * * * *

Case No. 21-CC-234.

1. Labor Organization or Its Agents Against Which Charge Is Brought:

Name: Meat and Provision Drivers Union Local No. 626, International Brotherhood of Teamsters.

Address: 846 South Union Avenue, Los Angeles 17, California.

The above-named organization or its agents have engaged in and are engaging in unfair labor practices within the meaning of section (8b) subsections (4) (C) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

On or about June 11, 1956, the party against whom the Charge is brought established a picket line at the place of business of Lewis Food Company, 817 East Eighteenth Street, Los Angeles, California; that on or about June 6, 1952, the NLRB certified the Association of Pet Food Manufacturers Employees as the bargaining representative of the employees of Lewis Food Company. Lewis Food Company has a collective bargaining agreement with the said Association; that at all times since June 11, 1956, the party against whom the Charge is brought has induced and encouraged employees of Lewis Food Company, Certified Grocers, Safeway Stores, Alfred M. Lewis Company and Wilson Trucking Company, to refuse to perform services for their respective employers, an object thereof being to force Lewis Food Company to recognize or bargain with Meat and Provision Drivers Union Local No. 626, as the representative of its employees, notwithstanding the fact that another labor organization has been certified as the representative of its employees.

3. Name of Employer: Lewis Food Company.

4. Location of Plant Involved: 817 East Eighteenth Street, Los Angeles, California.

5. Type of Establishment: Factory.

6. Identify Principal Product or Service: Manufacturing and Distributing Pet Foods.

7. Number of Workers Employed: 175.

8. Full Name of Party Filing Charge: Lewis Food Company.

9. Address of Party Filing Charge: 817 East Eighteenth Street, Los Angeles, California.

10. Telephone Number: Madison 6-0581.

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

LEWIS FOOD COMPANY,
By RAY L. JOHNSON, JR.,
Attorney for Lewis Food Company.

June 14, 1956.

NATIONAL LABOR RELATIONS BOARD

Twenty-First Region

111 West 7th Street, Los Angeles 14, California

Lewis Food Company
817 East Eighteenth Street
Los Angeles, California

October 15, 1956

Re: Meat and Provision Drivers Union Local No. 626, International Brotherhood of Teamsters (Lewis Food Company) Case No. 21-CC-234

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time and I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

Henry W. Becker
Regional Director

Certified Mail. Return Receipt Requested.

cc: General Counsel, National Labor Relations Board, Washington 25, D. C. Meat and Provision Drivers Union, Local No. 626, International Brotherhood of Teamsters, 846 South Union Avenue, Los Angeles 17, California. Hill, Farrer & Burrill, Tenth Floor—411 West 5th

Street, Los Angeles 13, California. Attn.: Ray L. Johnson, Jr., Esq. Stevenson & Hackler, 846 South Union Avenue, Los Angeles 17, California.

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel
Washington 25, D. C.

Ray L. Johnson, Jr., Esq. January 11, 1957
Hill, Farrer & Burrill
10th Floor, 411 West 5th Street
Los Angeles 13, California

Re: Meat & Provision Drivers Union Local No. 626, Int'l Bro. of Teamsters (Lewis Food Company)
Case No. 21-CC-234

Dear Mr. Johnson:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations of Section 8 (b) (4) (C) of the National Labor Relations Act, has been duly considered by the General Counsel.

The General Counsel sustains the ruling of the Regional Director. Like the Regional Director, the General Counsel concludes that there is insufficient evidence of violations to warrant further proceedings.

Yours very truly,

/s/ THOMAS J. RYAN,
Thomas J. Ryan
Assistant General Counsel
For the General Counsel

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time and I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

Henry W. Becker
Regional Director

Certified Mail. Return Receipt Requested.

cc: General Counsel, National Labor Relations Board, Washington 25, D. C. Meat and Provision Drivers Union, Local No. 626, International Brotherhood of Teamsters, 846 South Union Avenue, Los Angeles 17, California. Hill, Farrer & Burrill, Tenth Floor—411 West 5th

Street, Los Angeles 13, California. Attn.: Ray L. Johnson, Jr., Esq. Stevenson & Hackler, 846 South Union Avenue, Los Angeles 17, California.

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(1) The district court erred in denying appellant's motion to abate the above entitled action until the proceedings before the National Labor Relations Board, numbered 21-CA-2061, 21-CA-2203, and 21-CB-708 are fully and finally adjudicated.

(2) The district court erred in ruling that damages are recoverable under Title 29, U.S.C., Section 187 (Taft-Hartley Act) for picketing against a Union which has been certified by the National Labor Relations Board when the action is commenced after the said Board has initiated a proceeding to revoke the certification in its inception.

(3) The district court erred in holding that a certification by the National Labor Relations Board is valid while it exists regardless of the fact that the said Board subsequently revokes the certification from the time of its inception, and regardless of the fact that the certification was originally obtained by means of withholding material information from the National Labor Relations Board.

Dated: July 15, 1958.

STEVENSON & HACKLER,
/s/ By HERBERT M. ANSELL,
Attorneys for Defendants.

Proof of Service by Mail Attached.

[Endorsed]: Filed July 17, 1958.

In the United States District Court, Southern District of California, Central Division

No. 20,333-Y

LEWIS FOOD COMPANY, a California corporation, Plaintiff,

vs.

LOS ANGELES MEAT & PROVISION DRIVERS UNION LOCAL No. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, etc., Defendant.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
February 17, 1958
2:00 P.M.

Honorable Leon R. Yankwich, Judge Presiding.

Appearances: For the Plaintiff: Hill, Farrer & Burrill, By: Ray L. Johnson, Jr., 411 West 5th Street, Los Angeles, California. For the Defendant: Charles K. Hackler, 1616 West 9th Street, Los Angeles, California. [1]*

The Clerk: Case 20,333-Y Civil, Lewis Food Company v. Los Angeles Meat Drivers Local 626, and so forth.

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

Hearings on pretrial conference and setting, and defendant's motion for abatement.

The Court: We are back where we were before, gentlemen, a plea in abatemnt.

I will hear you further on the plea in abatement, gentlemen. I am familiar with the Juneau Spruce case. The only question is whether it applies to this situation.

Mr. Hackler: The court please, the facts alleged in the plea in abatement are not in dispute here. It is just a question whether under the law the plea in abatement states grounds for staying of this proceeding.

In the plea in abatement and also in our separate statement of material facts it appears that before the filing of this action that the National Labor Relations Board had issued a complaint, which is now outstanding, and begun hearings on unfair labor practice issues against the company and the so-called independent union.

One of the allegations of that complaint—and it is set out in full in our plea in abatement—is the allegation that that association was at all times after January 1952 an illegal company-dominated organization. The pleadings and [3] admitted facts show that after its formation in 1952 it participated in and won a Labor Board election back in the beginning sometime, maybe it was in 1952.

In any event, the incidents that give rise to this lawsuit began in 1954 with picketing of the company's premises, which is admitted. About the time the picketing began the union involved here, the

Meat and Provision Drivers Local Union, filed a charge with the NLRB complaining that the association was, in fact, a company-dominated organization, even though it was functioning as the bargaining agent, and claimed to have a certificate of bona fideness that it was the bargaining agent from the Board.

Now, for reasons known only to the Board, the Board sat on that charge of unfair labor practices. Under the federal law and under the Taft-Hartley law a charge initiates a formal investigation by the Board, but is not itself, of course, any more than like a complaint in a criminal action; it initiates action by an administrative body.

The Board did nothing with that charge until up in April of 1956, at which time, based upon that charge and also upon a later charge filed by an individual, it issued the complaint which is now the subject of Labor Board action.

A hearing was set up, a Trial Examiner came in from San Francisco. At the beginning of the hearing the Government's attorney, — of course, your Honor is familiar with the [4] fact that Labor Board attorneys themselves prosecute those cases in the name of the Government—asked for compliance with certain subpoenas for documents and appearance upon the part of company officials and officials of the attacked association. They declined to produce them and from that time until this, namely, April or June—I think the complaint was issued in April and it was to go to trial in June, or start the trial

—he recessed the hearing indefinitely to give the Government a chance to enforce those subpoenas.

Those subpoenas have been through the District Court here, through the United States Court of Appeals, and now certiorari has been granted by the Supreme Court on the narrow issue of whether or not the subpoenas were properly issued by the proper authority and within the scope of the administrative agency.

Following the issuance of that complaint the union resumed its picketing. It had actually picketed for three months back in 1954, August 19th until October 19th. No picketing took place between October 19, 1954, and shortly after the complaint was issued in 1956. Unfair labor practice charges were filed against the union on account of that picketing and dismissed by the Board as being without merit. And this suit was filed after the Board had issued its complaint attacking the bona fideness of the association from the beginning, attacking the company as having, according [5] to the complaint and what the Government is going to attempt to prove, that it sponsored, dominated and financed and assisted the organization from the beginning. They seek damages for both sets of picketing, the three months of picketing back in 1954 and the resumed picketing that began in 1956.

Now, it is conceded here that the basis of the damage action is a federal tort created by Section 303 (a) (3) of the Tart-Hartley Act. The tort created by that section is the calling of a strike or

similar activity by a union to oust a certified bargaining agent from its right as the exclusive representative of employees. That is all there is to the section. There are other sections that create damage actions for other types of conduct, but this one is premised, the gravamen of it is that the union I represent has been picketing in derogation of certified bargaining rights of another union. That section of the law, your Honor, condemns primary picketing. It isn't the secondary boycotting section. It says that no union, once the Board has certified a bargaining agent, should seek to oust that bargaining agent by picketing, but, on the contrary, it should take other steps to displace it.

It should be pointed out that if that organization is not a bona fide certified organization there isn't any tort. The law was not made, Congress did not see fit to make it and [6] create a damage action. These are statutorily created torts, not common law torts. It did not see fit to create a tort damage liability for primary picketing of an employer, even though there might be two unions in the picture, unless one of them were certified by the Board.

Now, the Board is at present engaged in an administrative proceeding, an unfair labor practice proceeding, over which it, of course, has plenary authority to determine whether that organization that it certified way back in 1952, I guess it was, ever was a valid labor organization under the Act, or whether, in fact, it was formed, dominated and assisted in violation of the Act.

Necessarily included within that would be a determination as to whether the Board's earlier action, in certifying it as a bargaining agent in 1952, either stands now or was ever entitled to stand. That is not an unusual situation, that a union will go to the Labor Board, get itself certified in an election, and it may be months or years before anyone brings to the Board a question as to whether it ever was a bona fide organization. That happens every day, and I have cited one of the United States Supreme Court cases, the well-known Wallace case, in which the Board held an election, certified a labor organization and actually participated in a settlement of company-union charges and allowed the union to continue to function, certified it and then later changed [7] its mind and initiated another proceeding and had for its effect the purpose of destroying the very existence of the organization. And that is pretty much the situation we have here. We have a tort action in which the defense is raised, one of the defenses—and obviously it is a definitive, dispositive defense, if it is true, the defense is raised that the certified union that we are claimed to be picketing against and in derogation of whose rights it is claimed that the picketing took place is itself now being examined to see if it ever had a right to function under the federal law.

Now, I don't think there can be any doubt, your Honor, that there is exclusive jurisdiction—not concurrent—in the National Labor Relations Board to determine what labor organizations are entitled to function in interstate commerce in this country. It

seems to me obvious—and the cases are to the same effect—you can't have state, federal courts and the Labor Board saying or making independent determinations of the bona fideness of labor organizations. Certainly, the Labor Board is the exclusive authority to grant or take away its own certifications, its own administrative acts of certifying labor organizations following an election.

Way back, I think it was under the Wagner Act, your Honor had one of the earliest cases—I believe it was the Douglas Aircraft case—where they sought to have this court enter into the intricacies of a representation election being [8] conducted or attempted to be conducted by the Labor Board. The earliest decided case——

The Court: Northrop.

Mr. Hackler: Northrop, yes. You are right, your Honor.

The Court: I had occasion to pull it out the other day.

Mr. Hackler: Its distinction——

The Court: It was Northrop against Madden.

Mr. Hackler: Yes. One of the earliest cases, if not the earliest case in the United States District Court in the country. Of course, the purpose——

The Court: There the question involved was that an election was pending and they came before the court and asked me to intervene on the ground that they already had a company union and it would nullify the contract. I held, in the first place, they were anticipating the result of what they might do, and, secondly, so far as the National Labor Relations

Act stood at that time, it provided a complete system of review and that that question could be raised in case the Board should certify the matter. Now, that is still the rule.

Mr. Hackler: That is the rule.

The Court: Now, the question before us is what remains of this special right they have given, that Congress has given in an action for damages arising out of the same practices. [9]

Mr. Hackler: Yes, sir. Let me address myself to that. We are clear that the rule is the same as it was when you decided that case, namely, with respect to elections and certifications of unions and the determination of what unions are bona fide and which ones are not entitled to function. Those are exclusively the province of the National Labor Relations Board, with appropriate appellate remedies through the United States Court of Appeals and to the Supreme Court.

Now, Section 303, the section under consideration here, does not alter that rule in a case such as this. Let me see if I can backtrack just a little.

The Court: I wish you would read it to me.

Mr. Hackler: All right, sir. The section provides——

The Court: I have it here, but I didn't want to stop and read it. If you read it aloud it will be easier.

Mr. Hackler: All right.

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in,

or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is——" [10]

and there follows, your Honor, four different illegal purposes, any one of which creates a cause of action for damages.

The first of them is secondary boycott, where the purpose is—you are picketing a neutral employer over here, causing him to quit doing business with the people with whom you had a dispute.

The Court: I got all these first. I remember I had the first one involved, the Edison strike.

Mr. Hackler: Yes. The section involved here, though, is the section which says:

"forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the Labor Relations Act;"

Now, that Section 9, your Honor, goes back to the sections of the Act that are confided to the Board and not to the courts. So that you have a federal tort premised upon a union doing something in derogation of an administrative act of the Board, namely, the issuance of a certification, a government stamp, so to speak, in an administrative proceeding.

Now, a further damage action is predicated—and

I can [11] make the distinction by showing you that —not involved here—the jurisdictional strike section, but not involved in this proceeding, but it was involved in Juneau Spruce, where the illegal objective is:

"forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *"

Now, that was the tort involved in the Juneau Spruce case, and the Supreme Court said in that case,—it was argued by the defendant union that, "You can't go through the trial of a damage action against us until the Labor Board has processed unfair labor practice charges, which themselves complain of the selfsame conduct."

In other words, the Board was proceeding to seek a cease and desist order against the selfsame conduct that the plaintiffs were in court seeking damages for. The court properly said, "Those are two separate remedies for the same conduct. One of them is in the public interest, prosecuted by a public agency, to bring about future compliance with the law and public interest. The other is a private action to redress damages caused in a private way by the same unfair practice."

The Court said, "The one is not res judicata of the other. For example, the Government might [12] prove or not prove its case, according to the quality of the evidence. The private parties may be able to prove or not prove its case."

But involved there was the selfsame conduct, where it said, in effect, "Congress has reached this conduct—granted two sanctions against it, one to run to the private party,"—and we know many areas in the law where that is true other than the NLRB. The Wage Hour has many sanctions, private and public, both. That is all it stands for.

Then the lawyers for the union came back and said, "Yes, but there is a little administrative proceeding that the NLRB is going through over here preliminary to issuing its complaint, in which it is trying to determine whether the picketing organization actually is entitled to the exclusive assignment of work and under a section of the law that authorizes and directs the Board to conduct that preliminary proceeding, to determine whether there is probable cause to believe the law has been violated.

I don't like to cite only your Honor's own cases, but your Honor may recall Los Angeles Building & Construction Trades case, which you heard in this court, and I was counsel for the Government in it, where you had the first case again involving that very Section 10 (k).

It was argued there you couldn't grant an injunction against a jurisdictional strike, that is, a strike to compel the assignment of work to members of one union rather than [13] another until the Board had concluded preliminary hearings to determine whether there was probable cause to determine whether one or the other organization was entitled to the work.

You ruled that you had the authority. You granted

the injunction. It went through the Ninth Circuit and was sustained, and I think certiorari was sought, and perhaps granted to vacate, and the case became moot.

Now, that is exactly the same section you were proceeding under there as the Juneau Spruce situation. Basically, the Juneau Spruce case says, "There is no res judicata. There is no requirement that you get the Labor Board to find an unfair labor practice before you file your tort action over the selfsame conduct."

There are many reasons for that that you can see would exist. The Board for monetary or policy reasons might drop the case or it might not assess the evidence as strongly as a private litigant. But that certainly has no application to the peculiar type of tort claimed here.

The very center of the tort here is whether or not the conduct of the union is in derogation of an administrative act of the Board, namely, the certifying of a union. It is that very act of certifying the union that that agency is now in the process of reexamining, whether that union was ever entitled to that certification. [14]

Assume, your Honor, you went ahead and tried the lawsuit. There are other fact issues, and that a judgment of damages were awarded against the union defendant. It would have to be premised upon the activity of the union in derogation of a certification of bargaining rights issued by an administrative agency. In effect, it would be implementing the act of that agency in issuing that certification.

Yet the union paid the judgment. The Labor Board in its current proceedings, if it establishes what it says in its complaint it can establish, would not only void the certification but actually destroy the labor organization itself that supposedly had the certification. It would rule that it legally had no right to function and, in effect, it had accomplished a fraud upon the Board when it got itself certified.

Well, should the union in that posture go back to the employer and say, "Well, you must have damages" for picketing against a certified union? The gravamen of it is the certification.

In a sense this unfair labor practice implements the Board's proceedings in certifying them. They could say, "Well, we want our money back. It has now been determined by the Board that it never should have issued that certification. It was defrauded into issuing it. It didn't know at the time the labor organization was formed in violation of the law." As a part of a scheme of unfair labor practice I have cited [15] the cases to show the kind of remedy the Board issues if its complaint is sustained.

There can be no question as to the scope of that proceeding, because I have quoted the two paragraphs of the complaint which flatly say that the attack is upon the bona fideness from the beginning of that organization in its certification.

The Court: The question is this: The complaint merely shows what would appear to be the final action that has gone to the Court of Appeals, supplemented by an injunction to prevent picketing and

so forth. Isn't there a finality to the action of the Board—regardless of what they may do in the future, wouldn't any damages which resulted from the prior action which you are now seeking to relitigate, wouldn't there be a bar to reopen that? Otherwise, they would never know when this remedy by damages would apply.

Mr. Hackler: Well, let me get at it this way, your Honor, so we are clear on our facts: Going back to August of 1954 the union began its picketing and at the same time made a charge that the certified union was not entitled to its certification. That it, in fact, was unlawful. Concurrently those two acts took place.

The Board did nothing with the charge for two years. But in the meantime they prosecuted the union and obtained a Board order,—it never went to the courts—saying that, "This union does have a certification. You did picket against it. [16] You should cease and desist doing so in the future."

The Board complied with that order and never went to the United States Court of Appeals for enforcement.

In the meantime the Board took another look at the earlier proceedings long pending before it and said, "We now have found we are going to process the earlier charge, that it was a company union all the time." They are processing that at the moment.

After issuing that complaint the union reinstituted its picketing; its position had been vindicated.

Here the Board now is willing to go back to the beginning and in effect say, "We were in error in

processing this other case. We saw fit to process it first."

The union came into the other case and said, "We want to prove in the first case it is a company union."

The court said, "No, the only way you can do that is under unfair labor practice charges separately filed against these parties. You can't urge it defensively."

We said, "All right. We have got our charge on file. Maybe sooner or later you will proceed upon it," which they have done.

Subsequent to the issuance of the present complaint, which goes way back to the charge at the time of the picketing, the union renewed its picketing and the Board said, "Hands off. We are not going to issue another complaint nor are we [17] going to hold you in violation of our order, because we now see from the beginning this organization was improper."

If the Board had sustained in its present complaint, your Honor,—it is a simple motion to be filed in the earlier Board proceedings, to say, "Here, you have issued an order telling this union, 'Don't picket against this certified union because it has a valid certification. You have now said the certification never was any good. That they got it, in effect, by concealment and fraud because they were a company union from the outset.'"

A simple motion would vacate that proceeding, and as pointed out here in the Juneau case, there

isn't any res judicata so far as the unfair labor practices themselves are concerned.

Counsel has put into his complaint the fact that while the Labor Board ordered this union to cease and desist from its earlier picketing—I don't know where it has a place in this complaint because the Juneau case says that action is res judicata, any more than the court's action in a damage suit is res judicata. It isn't that that is res judicata. What it is is that the center of this particular unfair labor practice turns upon an administrative determination of the Board, as to whether there is a valid certification.

Now, let's go the other way. Suppose you do not abate the action. We defend here upon the ground this is a company [18] union, formed in violation of the law and not entitled to any certification. That it got it by fraud, and would prefer to come in and take considerable evidence, the same evidence the Labor Board is going to hear over here if they ever get through enforcing their subpoenas.

Now, your Honor is going to be asked to rule that you won't hear that evidence, and I think properly so. You would say, "Well, Mr. Hackler, we stand on the certification. I can't go behind it. I am not going to let you come over here and try to prove this was a company union from the beginning, in order to show that the certification that you allege was enacted in derogation should not have been issued. I cannot set the certification aside." You would tell me that, and properly so. So you would leave a litigant in this type of case where a

dispositive defense just isn't available to him at the time of the trial.

Now, conversely, suppose the Labor Board in its current proceedings isn't against the union, the defendant here, but it is against this plaintiff and its association. Let us suppose the Board fails to prove its case and solemnly declares, "This organization was legitimate from the beginning and its certification is still good," why, then I would be bound by that in your court, your Honor, when this action came on for trial.

In fairness to the court, I think there is only one forum. [19] The Board has said that in its first decision when I was trying to urge it defensively, when they were prosecuting us, they said, "No, Mr. Hackler, you must go through — get the General Counsel to issue a complaint, if you can, because he is the sole custodian." And I don't see any other answer.

I might say in passing, there are two lawsuits filed over in the state court over the selfsame picketing, filed before this action. They both are just sitting there. The same position is taken there.

Somewhere along the line, even under this authority, the union must be able to urge the defense effectively, that the certification it is supposed to be attacking was not valid in law, because the essential element in this case is that it was a certified union.

Now, the argument on the contrary runs like this: The certification is a piece of paper. It has the union's name on it and you can't go behind it. Once

that magic piece of paper came into the hands of a labor organization or a group alleging to be one, automatically damages grind if anyone pickets against it, ignoring the fact that the Board had issued it in an appropriate proceedings and is in the very act of tearing it up, if it is successful in its proceedings, and tearing it up ab initio.

The Court: When you say the company is damaged by a violation of an act permitted in derogation to them, don't [20] they have a right to institute an action and wouldn't the action be rather a usury suspended in the air?

Mr. Hackler: No, your Honor, because of this reason——

The Court: In the statute of limitations, for instance, we have what is known as a suspended provision. For instance, if a person is out of the state you couldn't be sued, the statute doesn't run during that period. That question is in the minority, is a minor question.

Mr. Hackler: I think the answer to that is this, your Honor: First, the employer can file its damage action the day the picketing began, when it has a union certification in the plant.

The Court: Didn't they do that here?

Mr. Hackler: They started——

The Court: They wanted to come here because they wanted me to start——

Mr. Hackler: What I was about to say, your Honor, was this: Suppose the action is filed, as it was here, there isn't any proceeding pending at the Board. I file a charge and the Board throws it out

for lack of merit. It is true it won't process the case against the certification. Then I am bound, I can't come in here and attack it, the certification. I am sure you are not going to hear evidence in the case.

You are going to say, "The certificate of the [21] administrative agency stands. I can't go behind it."

In the average case, where there is a bona fide organization, the plaintiffs filed — it can be filed either in the state court or the federal court, and there may not even be a charge of unfair labor practice because the issue may not even be in the case, but if it is in the case, I must then go to the court and if there is no merit to my matter they throw it out, and I am bound. It so happens that here they have found sufficient merit that they themselves are re-examining the bona fideness of this organization. It is true they are doing so after, on the strength of the certification they issued an earlier order against me.

I see the employer has this advantage, no one is saying to dismiss the action. You file an action, but if, while that action is pending, like this case I cited here, General American Tank Car Corporation. Now, there was an action for damages by a shipper, at a time when the ICC was inquiring into whether certain conduct amounted to an unlawful rebate. One of the defenses of the action against the shipper was, "I can't acknowledge these damages. If I did so it would be in the nature of an unlawful rebate."

And the court there said, "Whenever, in an action for damages, when the issues of a defensive char-

acter appear or are within the cognizance of an administrative nature, the proceeding ought to be stayed to get the word from the administrative [22] agency, after which the Board will be bound."

Now, that works in one of two ways. Suppose the Interstate Commerce Commission here simply dismissed the proceedings and said, "We don't think there is enough to proceed on here."

The Court: Oh, I agree with you on that. We had one case involving rates and we didn't discover it until the middle of the trial, the fact that the reasonableness of a charge had not been placed before the Board. We stopped the proceedings for ten months. It involved the shipping of furniture.

The question here is whether the company can deny the finality of that order, whether this action must stand by in the hope that some day the Labor Board might change its mind and decide it was an error, and the right of action accrues the moment there is such change. But it wouldn't entitle them to relief until such time as the Board said they were wrong; to all intents and purposes it was final.

Mr. Hackler: Well, I think, your Honor, it would be the same in the shipping case, if you said, "Well, we will go ahead and try it. The Federal District Court perhaps might grant damages and ignore the administrative proceedings, which might vacate those damages later."

I should point out equitywise, your Honor, the Labor Board started in June 1956, 19 months ago, that it sought to [23] go to trial. The trial has been

delayed, not by these defendants, but by the refusal to obey subpoenas that the United States Court of Appeals had said were valid subpoenas and ought to be obeyed. So actually the company here has successfully stalled the proceeding to determine whether this organization was ever bona fide. They are now the United States Supreme Court. Those delays are not caused by the union.

In the complaint they are seeking as best they can to bring to an issue and make a decision as to whether this was ever a valid organization. And for them to come to court, after the Board has attacked—they are not the employer who came in and said, "Oh, I filed my suit and then the union ran over to the Board and got the thing held up." They filed their lawsuit after the Board had attacked the bona fideness of this organization. The picketing was not resumed until after the Board had issued its complaint.

The union in the strict belief, "Well now, here, the earlier three months of picketing the Board held was in derogation of the certificate of this other organization. Now at long last the Board has said it is going back to the beginning and erase this organization on picketing its protest over the very unfair labor practices alleged in the unfair Labor Board complaint."

The Board declined to prosecute the union over [24] the second picketing. Charges were filed. They said, "There is nothing to them. We are not going to stultify our processes, now that we are proceeding on the theory this is an illegal organization, to

tie unions up so they can't do anything about illegal organizations under the guise of a certificate which they obtained from us many years ago."

So if there is any feeling on the part of the Board the present picketing has been validated by them it is in support of their own position, where we have been delayed 18 long months here and we may be delayed much more, your Honor. The enforcement of the subpoenas is in the United States Supreme Court.

Let's assume they sustain the Ninth Circuit, or either way, the Labor Board starts again, resumes its hearings, it may be a year or 18 months with these kind of delaying tactics before you ever get a decision, not because of any delay of ours. The Government is prosecuting the union in this.

In the meantime we perhaps have been stuck for damages, as there are other issues, fact issues, but we stoutly insist we have as good authority as Judge Learned Hand on our side of the law, as to whether our picketing was against the certification. It is a live issue of fact here.

Supposing we go through a time-consuming and expensive trial here and your Honor should rule that issue against us, both on the law and the facts —which we hope wouldn't happen, but it is a possibility—and then we start an expensive appeal up to the Ninth Circuit. Why, this litigation will go on and on and on and on, where the ordinary orderly procedure, where a live issue exists, prosecuted by the federal agency who has sole authority to determine whether there is a bona fide certificate,

in the act of grinding out its processes, void the certificate, void even the existence of the organization.

Now, to say a damage action should be tried when all of those proceedings were in existence before it was even filed, it doesn't seem to me that is proper allocation of authority between courts and administrative agencies that gives the kind of practical results that people are entitled to.

I think that adequately states our position. I think the cited cases are——

The Court: I will hear from the other side.

Mr. Johnson: May it please the court, Mr. Hackler indicated that there might be some reason for our refusing to obey these subpoenas on the basis we want to delay these Board proceedings.

I want to state to your Honor if there wasn't merit in our position certiorari wouldn't have been granted by the United States Supreme Court.

We contend these subpoenas are wholly and entirely invalid. They seek to require the production of evidence we [26] are not entitled to produce. We won before Judge Thurmond Clarke here in the District Court, and I thought I had won in the Ninth Circuit Court. I was quite surprised when they upheld the validity of the subpoena.

I filed a petition for writ of certiorari in the Supreme Court and it was granted. Our petition is not for the purpose of delay, but they are seeking to require the production in evidence of documents that they are not entitled to see. And we are also testing the power of the Labor Board to permit Trial Examiners to rule on our petition to revoke,

when we contend the statute clearly indicates the Board itself should rule on these petitions. The action has merit and we think we ultimately will prevail, but that is a side issue.

Mr. Hackler in 50 minutes did not deal with the contentions that we make in this case, and that is that the Labor Board has already decided these issues in its administrative proceeding against the union.

When we filed charges against the union for violating Section 8 (b) (4) (C) of the Act, which prohibits picketing and boycotting to compel us to recognize another union, when we have a certified bargaining agent in the plant, the union sought to raise as a defense the same two defenses they have now raised in this proceeding. One, that the association hadn't complied with the statute insofar as the filing requirements were concerned, and, two, that from its inception [27] this association that was certified was a company-dominated organization. The Labor Board struck out those defenses.

If your Honor sustains their plea in abatement it means your Honor is going to rule contrary to the Labor Board, if you admit these are valid defenses, because the Labor Board has stated they are not. If I may, your Honor, I have a copy of the Board's decision here, and I want to read what the Labor Board said on this point:

"The General Counsel first moved to strike an affirmative defense alleged in the following language:

"That the Association was not and is not the

duly and lawfully certified bargaining agent of the Lewis employees, within the meaning of Section 8 (b)(4) of the Act, and that the certification issued to it on or about July 22, 1952, was not and is not a valid and enforceable certification within the meaning of the last-mentioned section of the Act for the following reasons:

"1. The Association was at the time of the Labor Board election and the time of its certification a company union within the meaning of Section 8(a)(2) of the Act and said fact was well known to the Board and its agents, at the time the election was conducted in these certification issues. [28]

"2. Said certification was fraudulently obtained by Lewis and the Association because they and each of them knew at the time of entering into the consent election agreement which gave rise to said certification, that the Association was a company union and could not therefore be a lawful bargaining agent for the Lewis employees.

"3. The holding of an election and the certification of the Association upon a consent election agreement was an abuse of the Board's election processes, and the certification arising therefrom may not therefore be affirmatively used to prevent lawful picketing by the Respondent." Being this defendant union.

"4. The representation proceedings from which the certification arose were not and are not valid as against this Respondent, for the reason that Respondent was not a party to such proceedings and did not therefore waive its right and privilege to

show the true facts concerning the Company's domination of the Association, and the Board was without authority under the Act to hold an election or issue a certification valid as against this Respondent, based upon the waiver [29] by another and different labor organization, of its rights to establish the company dominated character of the Association."

Those were the defenses, the same ones you have heard, the same ones that are in the pleadings and the ones you have heard this afternoon.

The Board goes on to say—let me preface this by saying this is the decision of the Trial Examiner and his ruling and reasoning was adopted by the Labor Board.

"The General Counsel moved to strike the allegations on the ground that the facts alleged did not constitute a valid defense to the allegations of the complaint. He argued that the affirmative defense alleged a violation of Section 8 (a) (2) of the Act, the interference or domination of a labor organization by an employer, which could be found only in an appropriate proceeding where a complaint alleging such a violation had been issued. He also pointed out that the defense alleged that the certification of the Association was issued by the Board on July 22, 1952, so that any acts of so-called company domination or interference committed by the Company prior to, or at any time close to the date of the certification would have been barred long since by the 6-months statute of limitations in the Act."

Counsel for the Company took the position that if the [30] association was a company-dominated union Local 626 had a right to file a charge against the employer and when the charge was established in an appropriate proceeding the Board could and would direct the employer to cease recognizing the association.

"As to the propriety of the defense, counsel for the Union argued that the Board is without any jurisdiction to issue a certification to the Association when the Board's records afforded proof to the Board that the Association was a company-dominated union. He also argued that if a company could provide itself with a company-dominated union, which was able to obtain certification, that after 6 months no labor organization could picket that company without having a charge of 8 (b) (4) (C) placed against it. He stated he wished to introduce evidence to show that the Association was company-dominated, so that the Board could decide whether its administrative power could or should be used to promote and maintain a company-dominated union, or decide that the original certification should not have been issued.

"The motion to strike the affirmative defense was granted. The Trial Examiner stated that the certification of the Association had been issued by the Board in the course of a representation proceeding, [31] a type of proceeding over which it had exclusive jurisdiction, that the certification of the Association appeared to have been issued regularly and to be valid and proper on its face. He ruled

that under these circumstances the Union was restricted to legal procedure to set aside, vacate, or otherwise challenge the certification. He stated that, even if it were conceded that the action of the Board in certifying the Association was erroneous, an abuse of its discretion, or in excess of its authority, such a legal defect in the Board's determination and its certification, gave no right to the Union to decide for itself that the Board's determination was defective, and the Board's certification a nullity, and proceed to picket the Company, as if the certification and the certified representative did not exist. Fundamental legal procedure required that a decree or certificate of a judicial, or quasi-judicial tribunal, issued in a proceeding of which the tribunal had jurisdiction, which appeared valid and proper on its face be respected as valid until either the tribunal which had issued the decree or certificate, or higher authority, vacated, set aside, or rescinded the decree in an appropriate legal proceeding.

"The Trial Examiner pointed out that the Union [32] at any time could have filed a charge alleging Company domination or interference with the Association, and had the issue fully litigated before the Board and the courts, but that the Union could not arrogate to itself the right to decide that the Board's certification was null and void, and then picket the employer, as if the certified representative, and the certification, did not exist."

Now, as I have stated, the Labor Board adopted the ruling and the reasoning of the Trial Exam-

iner. Your Honor, that to me indicates that the Labor Board holds that its certificate is absolute until it is declared that we can no longer give effect to that certificate, and that it is no defense for a union to picket an employer with a certified union in the plant on the basis that the Board made an error in issuing the certificate or that the employer is dominating the association.

I do not understand yet and no one has been able to answer the question which I now ask. If the Labor Board ruled that this defense which they now present in this proceeding was no defense in the administrative proceeding, then we must either have a different body of law in the District Court than we do in the Labor Board proceeding or else we can proceed in this proceeding without regard to whether or not we have or it is found a year or two years from now that we have—— [33]

The Court: Their position is that the Labor Board had power to review its own decision, and that it has a proceeding before it now in which that question is, and until that is determined we shouldn't be determining the validity of their prior order.

Mr. Johnson: My point is this: The Labor Board has already determined that whether we have dominated that union does not constitute a defense and does not make lawful what the union has done.

The fact that the Labor Board may next year find we dominate this union has no retroactive effect. That certificate is good and valid on its face until the Board itself determines otherwise. And

it has said that the union cannot take it upon itself to decide that this certification is a nullity because they feel that we have dominated the union.

The Court: I am trying to clarify my own thoughts on the matter.

Mr. Johnson: Yes, your Honor.

The Court: Supposing they now, upon their own initiative, decide that the union was a company union from the very beginning. Wouldn't that, in effect, wipe out the act so that the violation by the union would in itself be a factor, because the court will declare that its prior order wasn't valid? [34]

Mr. Johnson: No, that isn't the effect of the Board's decision in this proceeding that it is taking against us. First of all, it will not determine that this certification was invalid from its inception. There is a six months statute of limitation in the Act. The certification was in 1952. They cannot rely on any of the acts in 1952 or at the time the union was certified, because 1954 was the date in which the picketing commenced. There is no power in the Board to make such a retroactive determination. The determination that the Board will make against us has nothing to do with the union —with the complaint against the union.

The Court: Intervening action.

Mr. Johnson: Yes. It will decide only from the time it issues its order we must cease recognizing that independent union. But, as Mr. Hackler said, the Board's action is one to guide future conduct. It doesn't have any retroactive effect. This union is still a certified union in this matter. We are still

giving effect to a contract on it. The Board only wins about 75 to 80 per cent of its own cases. Sometimes even though they prosecute and judge their own cases, the litigants sometimes win 20 to 25 per cent of the cases, but the significant thing is that even if they did ultimately decide we dominated this union it has no effect upon the validity of the union's conduct because the Board itself determined their certificate is valid and binding [35] against the union, until such time as they declare it to be invalid. And that the labor organization can't take it upon itself to start picketing where there is a certificate and then hope that the Labor Board will take action and that they can raise the defense that this is a company-dominated union.

We say, therefore, your Honor, going along with Mr. Hackler's thinking, there has been a determination by the administrative body in this case which is decisive of this point, namely, that their defenses which they now raise do not constitute a valid defense as to the legality of the union's conduct.

Let me point this out: I know, your Honor, that if it were ultimately found that we dominated this association, that if the union went back to the Labor Board and tried to get the Labor Board to modify or rescind their order and ruling, that they would certainly be unsuccessful in doing so, because the Labor Board has said in so many words that their certificate is absolute, until such time as they take action on the certificate.

In the meantime the parties can't take it upon

themselves to make a contrary determination. It has no retroactive effect.

Mr. Hackler keeps talking in terms of the fact that the Board is going to make some determination that since 1952 the certificate is invalid. I point out to your Honor this fact: [36] When we came in—I say "we"—when the Labor Board came in before Judge Peirson Hall for an injunction under Section 8 (a) (3) against the union, the defendants did not even raise this defense in that proceeding, namely, this defense that this was a company-dominated union.

The Labor Board stated in this proceeding which I am quoting from against the union, "The General Counsel's representative stated to the Trial Examiner that they were going to dismiss the Teamsters' charges against the company for lack of evidence."

And that the only reason they didn't do so is because there was no General Counsel. The General Counsel had resigned and the President hadn't appointed a new General Counsel. If there had been a General Counsel in office, the statement of the General Counsel of the Board was that they were going to drop the charges which the Teamsters had filed against the company on the grounds they had no basis in fact or law.

Now, what happened? The Teamsters got a fortuitous break. In March of '55, some six months later, the company engaged in conduct involving an employee, who was not even a member of their union, namely, they deducted his dues from his

paycheck before he had been with the company 31 days, and, as your Honor knows, an employee has 31 days in which to join the union. This employee was unhappy about it and he [37] went down and filed another charge against the company. It was on this new charge some six months later that the Board took action against the company.

As I state, in the proceedings against the union, the General Counsel made the statement they weren't going to proceed on the Teamsters' charge of company domination because there was no evidence of it, and they were just waiting for the appointment of a General Counsel to dismiss the action.

It was a fortuitous circumstance that six months later an employee went down and filed the charge against the company that this whole thing was opened up. It was something wholly unrelated to the offense involved, the picketing against the certification by the union. I wanted to clarify that point.

Your Honor, I have the transcript of the testimony if there is any question about it. I can certainly produce it, if there is any question about it, because I have it red-circled, the statement of the General Counsel representative on that point.

The Court: Well, I don't want to go behind the record. I am really concerned here with what appears on the face of the moving papers.

Mr. Johnson: I appreciate that fact, your Honor.

The Court: If the proceedings before the Counsel couldn't retroactively affect what happened in the

meantime, then no [38] matter what they do as to the future, then of course we are in the same situation.

As I gather, your argument is that that prior order, having become final, it is the law of the case and anything the union did in contravention of it is the subject of this tort action. If in the future in the present case they should decide that the union is company-dominated it would still not wipe out the prior order so as to legalize what had been done in the meantime.

Mr. Johnson: It is our position, your Honor——

The Court: Well, I am not doubting you——

Mr. Johnson: I understand. You are just thinking out loud.

The Court: I am just thinking out loud. Weren't you in the other day on that conference we had in the other matter, on the subpoenas?

Mr. Johnson: It was probably Mr. Gould.

The Court: We discussed some matters relating to some order pending now, where one company is trying to make me intervene and call for the enforcement of a subpoena the General Counsel doesn't want to enforce.

Mr. Johnson: Your Honor has before you, by way of exhibit, the Board's decision in the case against the union. And in the course of it they say, "In agreement with the Trial Examiner,——"

The Court: Isn't that attached to your complaint?

Mr. Johnson: Yes, your Honor. I just want to read about six or seven lines.

"In agreement with the Trial Examiner, we find that the strike and the ensuing picketing was for a proscribed object and that the respondent thereby violated Section 8(b)(4)(C) of the Act."

That is the Act where they can't picket where there is a certified union in the plant.

"For the reasons set forth in the intermediate report,—" which I read to you, your Honor.

"—we also find that the Trial Examiner properly rejected the respondent's affirmative defenses that its conduct was not violative of Section 8(b)(4)(C) because the Association allegedly was illegally dominated at the time of its certification or because the Association allegedly was not in compliance with the provisions of Section 9(h) of the Act when it achieved certification."

So you don't have before you, however, the reasoning which the Board adopted, and I would like —I have given your Honor the citation to the NLRB reports, which is 115 NLRB 890. I could give you the Labor Relations Manual citation on it, but I have the Intermediate Report here, and I state to your Honor that it is the Board's determination that [40] their certificate is absolute and that no union or employer could take it on himself to——

The Court: We don't have the Labor Board reports on the shelves of our library. If you want to leave that with the clerk we will return it to you later on.

Mr. Johnson: It is going to be one of my ex-

hibits, anyway, your Honor, so we could leave it in the file.

The Court: It may be received as an exhibit with this motion.

Mr. Johnson: I state to your Honor after reading this you will see that the Board takes the position its certificate is absolute and that no union or employer could justify ignoring that certificate.

Let me give you an analogy on the other side of the coin, your Honor. I, representing the employer, have a situation where there is a certified union in the plant—and this has happened and I have been prosecuted for it and it constituted no defense—there is a certified union in the plant, and within a month after the certification the employees on their own, without any action of the employer, want a different union and they present a petition to the employer and say, "We don't want you to recognize that certified union. We don't want it to represent us. Every one of these employees want this other union."

So the employer, seeing the wishes of the [41] employees there on a petition, signed by every employee in the plant, ceases to recognize the certified union and recognizes this other organization. And we were found guilty of an illegal refusal to bargain with that certified union. They said that we couldn't take it upon ourselves to make a determination as to whether that certification was valid or not. We had to bargain with that certified union until the Board told us otherwise.

Now, that certificate said the Board in that case

had validity at least for one year and we had to give it effect for at least one year.

Now, I say, on the other hand, that the union—and the Board has so ruled,—cannot take upon itself to assert that this union is company-dominated, therefore the certificate is void and therefore they are free to picket.

The Board said in the proceedings against the union, "This is a valid certification, issued pursuant to proceedings which the Labor Board has exclusive jurisdiction over. That certificate is valid until we or some court declares it to be invalid."

Now, I keep making this point. I will make it once again and then drop it. That determination has been made and it is the law of the case. Whatever decision they make against us, it will simply be a determination that we must cease recognizing the independent union. It will have no retroactive [42] effect whatsoever. It can't have any effect going back four years. The Board's decrees operate in the future. They take care of future conduct. Mr. Hackler made that statement himself in another connection. But that is the function of the Board, is to guide future conduct.

So, therefore, following Mr. Hackler's argument that the Labor Board must make the determination, I say they have made the determination in the proceeding against the union, which is dispositive of this issue, as to whether their defenses here are valid or not, and they have ruled that they are not. Their certificate is valid, even in the face of their defenses, and the defenses were stricken.

If your Honor should rule that their defenses are valid here and you have to wait until the Board gets through with its proceedings, it means your Honor must rule that these defenses are valid to this suit, which is a ruling which is contrary to the one made by the Labor Board in the proceedings against the union.

May I just have one second, to be sure I have covered the points I wanted to. There were a lot of subsidiary issues, your Honor, and I don't want to take your Honor's time on those. I am not even going to discuss the Juneau Spruce case, because I am firmly convinced that when your Honor reads the Board's decision in this case you will find they have ruled their certificate is valid until they or [43] some court revokes it. Until such time we must give effect to it and the union must give effect to it.

So we respectfully submit that nothing can be gained by abating this action until the Labor Board makes its determination against the company, unless your Honor is prepared to rule that the subsequent determination of the Board has a retroactive effect, such as to give validity to the union conduct at the time they picketed in 1954. And I say that the Board itself has determined that the findings they make in the case against us is no defense for what the union did, and they were found guilty of unfair labor practices and their defenses along this line were stricken.

I say, therefore, your Honor, that the plea in abatement should be denied on the ground that the

Board's decision against us ultimately will have no effect on the issues in this case.

The Court: All right.

Mr. Hackler: Just briefly, your Honor. I construe the Board's earlier unfair labor practice decision just exactly the opposite of counsel. You will read it in the intermediate report at the bottom of page 9. It is true that the Trial Examiner said we, the union, could not offer evidence of company unionism to attack the certification. He did so on the ground that was not an appropriate proceeding. The only way you could attack the certification was [44] to get the Board itself to file an appropriate proceeding to test it out, to reconsider it and do whatever it wanted to with it. That is clearly stated. It is a long quotation and your Honor may have missed it. I read at the bottom of page 9:—this is the Trial Examiner whose reasoning was adopted by the Board—

"The Trial Examiner pointed out that the union at any time could have filed charges alleging company domination or interference with the Association, and had the issue fully litigated before the Board and the courts, but that the union could not arrogate to itself the right to decide that the Board's certification was null and void and then picket the employer, * * *"

Now, at the time he was ruling, your Honor, the Labor Board—he was telling us, "You can't defend on this ground. You have to convince the General Counsel to take agency action to attack this certification."

In the meantime that agency action had been begun after this decision. And to show you clearly it means something to the NLRB, we only picketed three months, between August and October 1954, and then there wasn't one scintilla of activity in this plant until the middle of 1956, and the resumed picketing didn't take place until the Labor Board sent out its own proceedings, examining and attacking this certification.

We picketed after they issued a complaint in April, the [45] hearing came on in June and a few days after the hearing opened we began picketing. Our signs say, "We are picketing in support of the NLRB complaint."

The cases are legion in this country, both under the Wagner and the Taft-Hartley Act, that picketing in protest over unfair labor practices is far from being a violation of the Act, but enjoys the highest protection of the Act. Our present picketing right now is for that purpose, and the NLRB had administratively determined that to be true, because they have refused to entertain any charges over the renewed picketing.

Now, they want damages in this court for the picketing that began after the Labor Board started its own proceedings to re-examine this certification. The very thing that the Trial Examiner said, that it was our proper place to go. We finally got there after his decision.

The Labor Board is recognizing that it is not going to stultify itself by having one proceeding going, attacking the certification and the validity of

a union, and yet have another one going over here saying, "Yes, but you have to honor the piece of paper that that union got from us." They won't go on it, but he is asking this court to.

Now, he raises this issue: He says, "Oh, Labor Board remedies are prospective, and, in any event, even if they found we owned this organization body and soul," and the [46] employer, in effect, got himself certified as the bargaining agent, that it will only act in the future. That simply isn't the law. The Wallace case in the United States Supreme Court, which is cited in our brief, involved this set of facts:

The Labor Board had company union charges before it. It settled those. It settled those charges and went to an election, held a Labor Board-sponsored election and certified the alleged company union, saying in effect at that time, "There is no impediment, no impediment whatever in certifying you as the bargaining agent of these employees," even in the face of the charges.

They settled them out, and said, "Well, we think this union might have been assisted somewhat, but it wasn't dominated and, in any event, it has purged itself. We will certify it." And certified it as a part of a Labor Board-sponsored written settlement agreement between all parties.

The Labor Board came along a few months later and issued a complaint against the organization, and it was urged, "You can't reach back and undo the certification. You can't reach back and undo your own settlement agreement." That is the exact

issue that went to the United States Supreme Court.

The Board said, "We reach back in the public interest and do whatever is necessary to remedy unfair labor practices. Congress has confined to us those remedies, and in this case [47] we are reaching back."

I could cite you cases all afternoon where the Board, upon a finding of company unionism, has ordered the company to pay back the dues to the working people who were compelled, as a part of the company union scheme, to pay dues into the organization way back beyond the six months statute of limitation. Now, if that isn't giving retroactive effect to an order, I don't know what it is.

The short answer to that is, as I have cited the case in my points and authorities, and I have the quotation there, "It is for the Board to determine what the remedy will be to expunge the effect of unfair labor practices."

One thing, and then I will sit down, and that is, the time of this is important. In April of 1956 the Board issued its complaint. Just as the Trial Examiner said, "That is your remedy, Mr. Union, if you think this organization is no good."

They issued their complaint in June. They started the trial. The picketing began with the sign saying, "Protesting the Board's unfair labor practices." And it was after all of that that this plaintiff filed this lawsuit.

You don't have a case of an employer who comes in and files a lawsuit and then the union hastens

over to the Labor Board and says, "We will tie this thing up in some administrative proceeding." At the very moment the lawsuit was filed [48] the agency was in the process, as it is still 18 months later, trying to undo the certification. And what stands between us in getting it done is being dragged through the courts on subpoena enforcement. I think whatever equities there may be, one way or the other, the employer can't complain if he waits until the administrative agency itself is re-examining the validity of the certificate before he files a lawsuit. He is not in very good position to say, "Well, my lawsuit has to be tried first. I won't give the agency a chance to rule on this matter, to see what its remedy is going to be, although I stood by and waited until the association came under attack before I decided to seek damages in this court."

The Court: All right, gentlemen.

Mr. Johnson: May I reply to that last point? It is pretty serious.

The Court: Are we going to go back and forth?

Mr. Johnson: No, but this is a point that was raised and now I want to clarify this implication that we waited to file suit here until after the Board proceeded against us. That is completely false. Let me tell your Honor what happened.

The Court: The action was filed August 17, 1957.

Mr. Johnson: Right. Your Honor, I had filed three days after the picketing started a suit in the state court, under [49] the State Jurisdictional Strikes Act. I filed that in August of 1954, three

days after the picketing started. Then your Honor, who is familiar with labor law, knows we got a line of United States Supreme Court decisions, which took away from the state courts a great area of jurisdiction. I had serious doubt then of my ability to remedy this conduct under the state law.

I decided, therefore, before the statute of limitations ran in the federal court that I should file this action to protect myself in the possibility they might rule that there was no jurisdiction in the state court and then I would be out of both courts. So lest there be any erroneous implications arise out of Mr. Hackler's remarks, I want to state that the reason we didn't file until '56 in the Federal District Court is that I had an action on file to recover damages for the same conduct in the state court during that time and it was only when I thought that I had lost my right to proceed in the state court that I felt it necessary to file an action over here in the federal court under the federal law.

Thank you very much.

The Court: Gentlemen, the matter will stand submitted. I will vacate the order relating to pretrial because future pretrials will depend upon the ruling in this case. If I abate it, of course, it will lie dormant until we see what [50] the Board does, and if I do not, then I will merely notify you, and I will give you a couple of weeks' notice and we will take it up again and see what we can decide on pretrial.

So I will set aside the order for pretrial set for

today and order the matter, the plea in abatement, submitted, and give you further notice depending upon the ruling I make on this.

Mr. Johnson: If it will be all right, your Honor, I have exhibits in the pretrial conference order. Shall I hold them until we receive——

The Court: What could we accomplish now with this hanging in the air?

Mr. Johnson: I don't think they would accomplish anything. Under the rules, within a certain period of time I am supposed to put them in evidence with the clerk.

The Court: We will suspend the limitations, the time, of that general order,——

Mr. Johnson: That is what concerned me.

The Court: ——until I rule on this and then we will start over again.

Mr. Johnson: Thank you. That is what concerned me.

The Court: I will dispose of this as soon as I can, gentlemen, but I seem to have drawn quite a large number of important questions today. I was on the bench until 1:00 o'clock this noon, having some very complicated questions of [51] copyright law and summary judgment submitted to me and I am finishing work on a patent case and also trying a condemnation case, so I have to find hours in between to dispose of these matters.

I can't promise you a ruling under a couple of weeks.

Mr. Hackler: Your Honor, I think it might be helpful and in the interest of a full record to give

you the Board's complaint and order of hearing, so you have the whole present outstanding complaint of the Board.

The Court: If you want to present that as your evidence.

Mr. Hackler: I would like to offer that in evidence as part of the plea in abatement.

The Court: All right.

(Whereupon, at 3:35 o'clock p.m., Monday, February 17, 1958, an adjournment was taken.)

CERTIFICATE

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of July, 1958.

/s/ VIRGINIA K. WRIGHT,
Official Reporter. [53]

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 6, inclusive, containing the original:

Defendants - Appellants' Statement under Rule 75(d) F.R.C.P.

Designation of Record on Appeal by Defendants-Appellants, filed June 11, 1958.

B. One volume of Reporter's Official Transcript of Proceedings had on February 17, 1958.

I further certify that my fee for preparing the foregoing record, amounting to $1.20, has been paid by appellant.

Dated: July 10, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the

United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 4, inclusive, containing the original:

Designation of Record on Appeal by Defendants-Appellants, filed 7/17/58.

Defendants-Appellants' Statement under U. S. Court of Appeals Rule 17(6).

I further certify that my fee for preparing the foregoing record, amounting to $1.20, has been paid by appellant.

Dated: July 18, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16022. United States Court of Appeals for the Ninth Circuit. Los Angeles Meat and Provision Drivers Union Local No. 626 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Appellants, vs. Lewis Food Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 19, 1958.

Docketed: May 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16022

LOS ANGELES MEAT AND PROVISION DRIVERS UNION, LOCAL No. 626, ETC., et al., Appellants,

vs.

LEWIS FOOD COMPANY, a California Corporation, Appellee.

AMENDED DESIGNATION OF RECORD ON APPEAL BY DEFENDANTS-APPELLANTS

Pursuant to Rule 17(6) of the Rules of Civil Procedure, Los Angeles Meat and Provision Drivers Union Local No. 626, etc., et al., appellants in this appeal, hereby designate that the following portions of the record, proceedings and evidence shall be contained in the record on appeal in the above entitled action:

(1) Complaint;

(2) Answer to Complaint for Damages and Plea in Abatement;

(3) Minute Order February 17, 1958;

(4) Memorandum by Judge Leon R. Yankwich;

(5) Notice of Appeal;

(6) Designation of Record on Appeal under Rule 17(6);

(7) Application for Order Extending Time to File and Docket Record on Appeal and Order thereon;

(8) Intermediate Report and Recommended Decision and Decision of National Labor Relations Board in Case No. 21-CC-190 which is reported fully in 115 NLRB No. 136 (March 22, 1956);

(9) Charge of Unfair Labor Practices filed by Charles Rico against Lewis Food Company, Case No. 21-CA-2061, dated August 27, 1954;

(10) Charge of Unfair Labor Practices filed by Otto A. Roth against Lewis Food Company, Case No. 21-CA-2203, dated March 29, 1955;

(11) Charge of Unfair Labor Practices filed by Otto A. Roth against the Association of Food Handlers, Case No. 21-CB-708, dated March 29, 1955;

(12) Consolidated Complaint of Henry W. Becker, Regional Director, National Labor Relations Board, Twenty-First Region in Case No. 21-CA-2061, 21-CA-2203, and 21-CB-708, dated April 30, 1956;

(13) Order of Henry W. Becker, Regional Director, National Labor Relations Board, Twenty-First Region, consolidating Case No. 21-CA-2061, 21-CA-2203, and 21-CB-708, dated April 30, 1956;

(14) Charge of Unfair Labor Practices filed by Lewis Food Company against Meat and Provision Drivers Union Local No. 626, Case No. 21-CC-234, dated June 14, 1956;

(15) Letter from Regional Director of National Labor Relations Board, Twenty-First Region, dated October 15, 1956, to Lewis Food Company, dismissing Case No. 21-CC-234;

(16) Letter from General Counsel of National Labor Relations Board dated January 11, 1957, to

Ray L. Johnson sustaining the dismissal of Case No. 21-CC-234;

(17) Reporter's Transcript of oral argument presented on February 17, 1958.

Dated: September 2, 1958.

STEVENSON & HACKLER,
By HERBERT M. ANSELL,
Attorneys for Defendants Los Angeles Meat & Provision Drivers Union, Local No. 626.

Proof of Service by Mail Attached.

[Endorsed]: Filed September 4, 1958. Paul P. O'Brien, Clerk.